

**CLIMATE CHANGE INDUCED MIGRATION: LEGAL AND PRACTICAL  
CHALLENGES**

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by

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# **CLIMATE CHANGE INDUCED MIGRATION: LEGAL AND PRACTICAL CHALLENGES**

## **ABSTRACT**

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The dissertation engages with scholarship proposing legal and policy responses to address climate change induced migration: it mainly engages with literature advocating creative interpretation of existing international law, and the adoption of a new multilateral instrument (a stand-alone multilateral instrument or a protocol to the Refugee Convention or the United Nations Framework Convention on Climate Change). This particular research is distinctive from previous research because of the following reasons.

Many have maintained that the current international legal framework does not provide adequate explicit protection to climate change migrants by examining the provisions of the relevant legal instruments. The dissertation is different in that it conducts a historical investigation of the development of the relevant regimes and the evolution of sociological theories of vulnerability to show that the inadequacy of the already existing law lies in the conception of vulnerability that is espoused in the instruments. How vulnerability is conceived in the instruments does not adequately address the complex socioeconomic and political issues underlying climate change induced human movement.

Another contribution that the dissertation makes is to bring in the idea of cosmopolitanism to the discussion on the possible legal and policy responses to address climate change induced migration and to justify responses. Contrary to the argument that there is no justification for proposals that advocate rights based protections for climate change migrants, I argue that a cosmopolitan understanding of justice offers a more robust justification for providing protection.

I argue also that there is no single cure-all response that can apply to all the different scenarios of CCIM. Instead, a combination of different strategies, including both legal and extra-legal- including migration pathways, relocation and complementary protection could provide a good start. In order to be effective, any response needs to reflect the particular context within which it will be applied; the underlying inequalities and vulnerabilities in a system. The legitimacy of any legal or policy response should be based on the voice of stakeholders.

## **BIOGRAPHICAL SKETCH**

Hanna Haile received her first law degree with Great Distinction from University of Asmara, Faculty of Law in Eritrea in 2006. After clerking at the High Criminal Court in Asmara, Eritrea for a brief period, she worked as a teaching and research assistant at the University of Asmara in the areas of international law and environmental law. At Cornell, she received full scholarship as an Institute for Africa Development Fellow while working towards her LL.M. degree in 2009- 2010 and was an IAD fellow again in 2010-2011.

Her diverse research and teaching interests are in international law, intellectual property, environmental law, human rights, and development. Currently, she is working on her J.S.D. dissertation under the supervision of Professor Muna Ndulo, which examines the human face of climate change and the challenges that current and future migration trends pose to conventional legal and normative political theories and to international law.

Hanna Haile is admitted to the practice of law in the State of New York.

For my loving parents, in Memoriam

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I am indebted to many who were kind enough to fit me between their travels and their busy workday to respond to my endless questions. I would especially like to thank Alice Thomas, Atle Solberg, Daniel Salomon, Cosmin Corendea James Morrissey, Kenneth Weiss, Koko Warner, Kaeruru (Lulu) DeBoar, Michael Kidd(Dr.), Michael Nash, Michael Roman, Ross Maitinnara, Scott Leckie, and Walter Kaelin.

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## TABLE OF CONTENTS

ABSTRACT .....	iii
BIOGRAPHICAL SKETCH.....	v
ACKNOWLEDGMENTS.....	vii
TABLE OF CONTENTS .....	viii
LIST OF TABLES .....	xii
LIST OF ABBREVIATIONS AND ACRONYMS .....	xiii
PREFACE.....	xv
CHAPTER 1: Introduction.....	1
1. General Background of the Research .....	1
2. <i>Presentation of Issues and Research Questions</i> .....	9
3. Research Methodology and Methods .....	13
i. Descriptive approach .....	13
ii. Critical approach .....	16
iii. Normative Approach .....	17
4. Significance of the Study.....	19
5. Structure of the Dissertation.....	23
CHAPTER 2: A Multidimensional Conceptual Framework For Climate Change Induced Migration .....	27
1. Understanding the Reason for Movement from a Physical (Scientific) Perspective.....	29
i. The Causes .....	30
ii. The Evidence.....	33
iii. The Consequences.....	36
2. Conceptualizing Reason for Movement: Vulnerability .....	38
i. Why do People Move: Insight from Lee’s theory of Migration .....	39
ii. What is a Disaster?.....	40
iii. Vulnerabilities .....	42
3. A Cosmopolitan Approach to Addressing Climate Change Induced Migration	

i.	What is Cosmopolitanism? .....	47
ii.	Justice for CCIM .....	53
iii.	Cosmopolitan Justice for CCIM: A Rights Based Approach.....	64
4.	Conclusion .....	72

### CHAPTER 3: The Practical Challenge: Variability Of Vulnerabilities Across Climate Change Hotspots..... 73

1.	Africa.....	77
	Eritrea .....	80
i.	General Background .....	81
ii.	Vulnerabilities and Movements .....	82
iii.	The Face of Climate Change in Eritrea.....	86
2.	South Asia: Bangladesh.....	89
3.	Low Lying Island States .....	93
	Kiribati.....	96
i.	General Background .....	96
ii.	Vulnerability to Climate Change .....	100
iii.	Adaptation Strategies .....	102
4.	Conclusion.....	106

### CHAPTER 4: Twisting The Old: Creative Interpretation Of Existing Law In Response To Climate Change Induced Migration ..... 107

1.	The Refugee Regime .....	110
i.	Refugee Vulnerability Historically Conceived.....	110
ii.	The Geneva Convention on the Status of Refugees .....	114
iii.	Litigation: The “Climate Change Refugee” Case .....	125
2.	The Human Rights Regime .....	136
i.	Conceptual Framework.....	136
ii.	Relevant Human Rights Principles .....	140
a.	The role of Soft law instruments.....	144
ii.	Litigation at the intersection of human rights and humanitarianism- New Zealand’s climate change residence case .....	146
3.	The Climate Change Regime.....	150

i.	Formation: History of the Climate Change regime .....	151
ii.	Underlying Principles of the UNFCCC .....	152
iii.	Transformation of the Regime: Recent Developments and what they mean 157	
iv.	Climate Change Litigation: the Inuit Case.....	161
4.	Conclusion.....	164
CHAPTER 5: To Tweak The Old Or Bring In The New? Debates On Adopting A New Multilateral Ccim Legal Instrument.....		
1.	A New Treaty .....	166
i.	The Current Legal and Policy Literature .....	166
ii.	Terminology and Typology.....	168
iii.	Drawbacks.....	173
2.	Alternative Approaches proposed by legal scholars.....	179
i.	Global Guiding framework.....	179
ii.	Migration Pathways .....	179
iii.	Relocation .....	180
iv.	Regional Responses .....	181
3.	An Overview of Ongoing Efforts by State and Non-State Actors .....	184
i.	The ILA Committees .....	185
ii.	The Nansen Initiative .....	188
iii.	Displacement Solutions.....	194
4.	A Holistic Response to CCIM.....	198
5.	Conclusion.....	200
CHAPTER 6: Conclusion.....		
1.	Findings .....	202
2.	Normative Considerations .....	204
APPENDIX .....		
Landmarks of the International Climate Change Regime .....		207
REFERENCES .....		
Books and Reports.....		218

Journal Articles.....	228
International Instruments and drafts.....	237
Case Law .....	239
Internet Sources .....	240
Personal Interviews and Email Correspondences.....	251

## **LIST OF TABLES**

Table 1: Landmarks of the International Climate Change Regime Pre-UNFCCC...207

Table 2: Landmarks of the International Climate Change Regime Post-UNFCCC..210

## **LIST OF ABBREVIATIONS AND ACRONYMS**

ASIL	American Society of International Law
CAT	Convention against Torture
CRC	Convention on the Rights of the Child
DS	Displacement Solutions
EJF	Environmental Justice Foundation
EU	European Union
ECHR	European Convention on Human Rights
GHG	Green House Gases
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Socioeconomic and Cultural Rights
IDPs	Internally Displaced Persons
IDMC	Internal Displacement Monitoring Center
IGO	Intergovernmental Organization
ILA	International Law Association
IOM	International Organization on Migration
IPCC	Intergovernmental Panel on Climate Change
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Socioeconomic and Cultural Rights
NAPA	National Adaptation Program for Action
NGO	Non-governmental Organization
OAU	Organization of African Unity
SIDS	Small Island Developing States
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations

UNDP	United Nations Development Program
UNEP	United Nations Environmental Program
UNHCR	United Nations High Commissioner for Refugees
UNFCCC	United Nations Framework Convention on Climate Change
US	United States

## PREFACE

*It was a sunny morning in June, 2009 in my hometown, Asmara in Eritrea. I was standing at a bus stop on my way to work when I saw a huge dusty government-owned truck stop at a gas station across from the bus stop. From its dusty exterior, one could tell that the truck had come from far. The truck was loaded with an assortment of household items normally used in villages.*

*The driver got off. In the cab of the truck, a woman dressed in village attire was breastfeeding a baby. What really struck my attention; however, were two very pale looking thin children around 10-years old, standing amidst the goods, in the back of the truck. They looked exhausted. The confused and curious expression on their faces showed unfamiliarity with the city surroundings. It did not take me long to figure out that this family was relocating. Before long, a similar truck with similar features and people crammed along with household goods at the back arrived. I just could not help but wonder where and why these families were moving with all their belongings. I then overheard people at the bus stop say that the government was moving people to areas which are more sustainable. Severe drought has left many areas in Eritrea desolate, and made agriculture practically impossible in some Southern villages. Thus, the government was relocating them to the West of the country which gets more rain.*

*I later learned that the people I saw at the gas station were but a few of the groups of people that the government was relocating as part of its adaptation program to the drought. Knowing that there are no laws to govern the relationship between the rights of those who were relocating, and the host communities, I was grappling with the thought of what chaos could ensue from this incident. The government's ad hoc effort*

*was commendable, but then in light of the fact that there is neither a legal nor a practical framework in place to protect the rights of the migrant and the host communities, co-existence between the migrants and the locals could be seriously difficult if not confrontational. I later learned that the magnitude of the problem was rather grave for North East Africa and the horn, which have been identified as hotspots for climate change induced environmental degradation and ensuing human displacement.*

*In recent years, there has been a mass exodus of Eritrean youths of all walks of life into neighboring countries. These youths move mostly to flee Eritrea's repressive atmosphere of violation of rights and fundamental freedoms as well as prolonged forced national service. In addition to its poor human rights records though, Eritrea has also experienced prolonged periods of drought and this has made life harder for those who rely on subsistence agriculture or pastoralism for sustenance. It renders them more vulnerable to the effects of environmental hazards and more dependent on the government. The repressive atmosphere coupled with poor environmental conditions thus pushes them to seek better alternatives elsewhere.*

*What has been happening in Eritrea inspired me to delve into further research on similar types of migrations and displacement. I came to learn that although the literature on refugee movement (movement of people because of refugee law convention grounds) and on economically motivated migration is vast, there is a dearth of legal scholarship on human movement caused by environmental degradation in general and that caused by climate change in particular. It is not clear where movement that is not purely economically or politically motivated, but compelled by either or both in addition to poor environmental conditions fits in any legal regime.*

# CHAPTER 1

## INTRODUCTION

*“Climate change<sup>1</sup> is the defining issue of our time. If we do not take urgent action, all our plans for increased global prosperity and security will be undone.”<sup>2</sup>*

UN Secretary General, Ban Ki Moon

### 1. General Background of the Research

My interest in this topic first began with particular events that unfolded in my country of origin, Eritrea. About six years ago, some parts of Eritrea had experienced drought of such severity that farmers were no longer able to grow crops in their villages. The government relocated some farming communities from their usual places of residence to other parts of the country. Although the areas they were moving to were not as hard hit by drought, they were still recovering from the destruction and ruin that had ensued from the border conflict between Eritrea and Ethiopia that was a fully-fledged war between the years 1998 and 2001.<sup>3</sup> In 2009, when drought struck, the Eritrean

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<sup>1</sup> The UNFCCC defines “climate change” as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” [See United Nations Convention on Climate Change, Article 1, Definitions, UN (1992), [https://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf) (last visited Jul. 15, 2015). Climate change can also be described as a change in the earth’s climate system- the interaction between the earth’s atmosphere (layer of gases), cryosphere (ice), hydrosphere (water), biosphere (life) and lithosphere (rocky part of the earth).

<sup>2</sup> Ban Ki Moon, “High Level Event on Climate Change with the Secretary General, the President of Indonesia and the executive Secretary of the UN Framework convention on Climate Change, United Nations Press Conference (Sept. 24, 2010), [http://www.un.org/apps/news/story.asp?NewsID=47718#.VPnQJvzF\\_h4](http://www.un.org/apps/news/story.asp?NewsID=47718#.VPnQJvzF_h4) (last visited Mar. 6, 2015).

<sup>3</sup> See, e.g., Anup Shah, *Conflict between Ethiopia and Eritrea* (Dec. 20, 2000), <http://www.globalissues.org/article/89/conflict-between-ethiopia-and-eritrea> (last visited Jun. 21, 2016).

government implemented the relocation without any legal or institutional framework in place to address the relationship between the host and the moving community and their respective rights and obligations.<sup>4</sup> As is the case with most government led initiatives, the concerned people exercised very little agency in the decision making. In addition to this type of internal movement, ever since the 2000s, a large number of Eritreans have been crossing borders into neighboring countries, such as Sudan and Ethiopia to flee from, among other things, human rights abuse, political and religious persecution, drought and bleak economic prospects.<sup>5</sup> In order to leave Eritrea, one needs to obtain an exit visa and because the issuance of an exit visa is dependent on one's ability to get a release from the Ministry of Defense, most people cross borders illegally and often find themselves in rather precarious situations. Some unfortunate souls become victims of the Eritrean government's shoot to kill policy at the border, or they could be caught and put in prison, while others die on the road because of fatigue, starvation or thirst. Some end up in the hands of traffickers and find themselves locked in underground facilities in the Sinai Desert, which is an area that neither the Egyptian government nor the Israeli government has been able to exercise full territorial control over. Those who manage to survive through this arduous journey may make it to Libya or Tunisia and embark on overcrowded and unseaworthy boats bound for Italy or Malta. However, not all of these boats make it safely to shore. In spite of the

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<sup>4</sup> This happened when I was still living in Eritrea and it was mentioned in the government owned national news outlet at that time (the only one allowed in the country).

<sup>5</sup> See generally, UNHCR, Eritrea, 2015 UNHCR Sub-regional operations profile - East and Horn of Africa, <http://www.unhcr.org/pages/49e4838e6.html>, (last visited Mar. 20, 2016). See also, Matina Stevis and Joe Parkinson, *African Dictatorship Fuels Migrant Crisis* (Feb. 2, 2016), <http://www.wsj.com/articles/eritreans-flee-conscription-and-poverty-adding-to-the-migrant-crisis-in-europe-1445391364>, (last visited Mar. 20, 2016). The caption says, "Thousands Flee Isolated Eritrea to Escape Life of Conscription and Poverty."

dangers associated with this kind of border crossing, the numbers continue to increase in a manner that can only be described as an exodus.<sup>6</sup>

In the case of mass migration originating from Eritrea a combination of different factors affect movement. In addition to environmental problems, people want to flee abysmal human rights conditions. Although the importance of studying each of these contributing factors is undeniable, I decided to focus on the environmental reasons for movement. I was interested in learning more about other communities across the globe that were facing similar problems, and the role of international law to deal with movements that are, to some extent, “climate change induced.” As I started researching the topic, I got immersed in the world of debates in legal, policy and academic circles on what should be done to address the plight of ‘climate change induced migrants’ or as popular media would often refer to them, “climate change refugees”.<sup>7</sup>

Nowadays, it seems unimaginable to pass a day without coming across a news article or a television program highlighting how the global climate<sup>8</sup> is changing at an

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<sup>6</sup> See generally, UNHCR, Eritrea, UNHCR Sub-regional Operations Profile - East and Horn of Africa (2015), <http://www.unhcr.org/pages/49e4838e6.html> (last visited Mar. 20, 2016). See also, Zachary Laub, *Authoritarianism in Eritrea and the Migrant Crisis*, COUNCIL ON FOREIGN RELATIONS (Nov. 11, 2015), <http://www.cfr.org/eritrea/authoritarianism-eritrea-migrant-crisis/p37239> (last visited Mar. 21, 2016).

<sup>7</sup> Most media outlets and film makers have used this term to describe human mobility which is in some way linked to climate change or environmental harm, even though such a category of protected persons does not exist in law. The term “refugee” is a legal term of art with a particular meaning within the legal and institutional framework of the Geneva Convention on the Status of Refugees (1951) and its 1967 Protocol (New York).

See, e.g., Algernon D’Amassa, “*The First Climate Change Refugees in the US are Native Americans*”, <http://krwg.org/post/first-climate-change-refugees-us-are-native-americans> (Feb. 24, 2016) (last visited Mar 21, 2016). See also, Tia Ghose, *13 Million Americans Could become Climate Refugees* (Mar. 14, 2016), <http://www.livescience.com/54042-climate-change-could-force-coastal-retreat.html> (last visited Mar 21, 2016).

<sup>8</sup> The word “climate” is used to describe long-term weather patterns, meaning that climate change is

unprecedented rate, intensifying slow and sudden onset environmental disasters. With this growing awareness of climate change's potential to disrupt life in colossal proportions, the world has witnessed the birth and growth of a number of state and non-state entities influencing or attempting to influence law and policy on climate change at both the local and global levels. Climate change has rightly become a major talking point in many negotiations, and conferences.

In the same vein, there is a growing awareness of how climate change intensifies environmental degradation and disrupts the ecological and social equilibrium that sustains life and livelihoods, often resulting in uprooting of populations from their homes.<sup>9</sup> This is important to address because movement and forced displacement in particular jeopardizes the human rights, development and security of the migrating community and the host community alike.<sup>10</sup>

Ever since I embarked on this research, discussion on climate change induced migration has grown in policy, legal and academic circles. A number of documentaries and TV programs have been made with powerful footages of illustrating what being at the forefront of the effects of climate change looks like. Some of these documentaries have grabbing titles, such as “climate refugees”, “Sun Come Up”, “The Island President”<sup>11</sup> or resort to dramatic imagery and metaphors descriptive of the way small

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“long-term change in the statistical distribution of weather patterns over periods of time that range from decades to millions of years” [<http://www.ensaa.eu/index.php/climate-change/97-defining-climate-change.html>] (last visited Jul. 15, 2015).

<sup>9</sup> As of March 21<sup>st</sup>, 2016, when I did a Google News search of the term “climate change refugees”, it returned 1,260,000 results, which shows that awareness of the issue has grown, but also illustrates the polarized manner in which it is talked about in the media, ranging from denial of its existence to complete doomsday approaches.

<sup>10</sup> See United Nations High Commissioner for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law*, 1–13 (2009).

<sup>11</sup> Michael Nash, “Climate Refugees: The Global Human Impact of Climate Change”, documentary

island states could be “obliterated” by climate change, e.g. the “New Atlantis”, “sinking island”, etc.<sup>12</sup>

Although environmental change related human movement is not a new phenomenon, the numbers of displaced persons as a result of the current and future trends in global climate change could turn out to be unmanageably large, because of intense floods, severe storms, drought, etc.<sup>13</sup> An abundance of scientific literature has highlighted the gravity of the impacts that these events have on life and if the projections that have been made by several independent atmospheric and climate scientists are accurate, four billion people are said to be vulnerable to the effects of climate change and 500-600 million people – around 10% of the planet’s human population – will be at extreme risk.<sup>14</sup> Many climate change scientists agree that the effects of climate change can cause displacement. For instance, studies by the United Nations High Commissioner for Refugees (UNHCR) indicate a clear, albeit multi-causal

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(Oct. 2010), <http://cornell.kanopystreaming.com/video/climate-refugees> (last visited Mar. 21, 2016).

Jennifer Redfearn, “Sun Come Up”, documentary (2011), <http://cornell.kanopystreaming.com/video/sun-come> (last visited Mar. 21, 2016).

Jon Shenk, *The Island President*, documentary (Mar. 28, 2012), <http://cornell.kanopystreaming.com/video/island-president>. Synopsis: “After bringing democracy to his country, President Mohamed Nasheed of the Maldives, the lowest-lying country in the world, takes up the fight to keep his homeland from disappearing under the sea.” <http://www.imdb.com/title/tt1990352/> (last visited Mar. 21, 2016).

<sup>12</sup> See e.g., BBC News, *Kiribati island: Sinking into the sea?* (Nov. 25, 2013), <http://www.bbc.com/news/science-environment-25086963> (last visited Mar. 21, 2016).

<sup>13</sup> This claim is based on the Intergovernmental Panel on Climate Change, the World Bank and the Stern Review which argue that large scale population movements will happen because of climate change. See Intergovernmental Panel on Climate Change, *Climate Change 2007 - the Physical Science Basis* (2014); See generally, Nicholas Stern, *The Economics of Climate Change: The Stern Review* (2007); World Bank, *CITIES, SEAS, AND STORMS* (2000).

<sup>14</sup> EJF, *No Place Like Home - Where next for climate refugees?* ENVIRONMENTAL JUSTICE FOUNDATION 1-2 (2009).

relationship between the effects of climate change and displacement.<sup>15</sup> In 1990, the Intergovernmental Panel on Climate Change (IPCC) had also underscored that the gravest effects of climate change may be those on human migration.<sup>16</sup>

The Internal Displacement Monitoring Center notes that in 2013 alone, three times as many people were displaced by disasters than by conflict.<sup>17</sup> There is no consensus on the exact number of potentially displaced people in the future; however, one of the earliest and most widely accepted predictions made by Norman Myers estimates that climate change would generate around 200 million or more migrants by 2050.<sup>18</sup> Many climate and atmospheric scientists say that global warming is at the heart of the unprecedented recent surge in the frequency and intensity of environmental disasters, such as hurricanes, cyclones, tropical storms, droughts, rising sea level and shoreline erosion.<sup>19</sup> The impact of extreme events on natural systems and by extension on

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<sup>15</sup> UNHCR, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law*, Submission to the 6<sup>th</sup> Session of the Ad Hoc Working Group on Long Term Cooperative Action Under the Convention 2 (AWG-LCA 6) (20 May 2009).

<sup>16</sup> Intergovernmental Panel on Climate Change, *Policymakers' Summary of the Potential Impacts of Climate Change*, (Report from Working Group II to IPCC, Intergovernmental Panel on Climate Change, Commonwealth of Australia) 20 (1990). The IPCC estimates that millions will be uprooted because of shoreline erosion, coastal flooding and agricultural disruption.

<sup>17</sup> See NRC, IDMC & ACNUR, *Natural hazards, climate change, and cross-border displacement in the greater horn of Africa: Protecting People on the Move. Outcome Report. Nansen Initiative Greater Horn of Africa Regional Consultation Nairobi, Kenya 21 – 23 May 2014*, 1–27 (2014). See also, NRC, IDMC & ACNUR, *Human Mobility, Natural Disasters and Climate Change in the Pacific. Outcome Report. Report from de Nansen Initiative Pacific Regional Consultation. 21 - 24 de mayo de 2013. Rarotonga, Cook Islands* (2013), [http://www.npis.org/PHE/CHaP\\_Report\\_No\\_\\_20\\_Final\\_\\_with\\_links\\_.pdf#page=37](http://www.npis.org/PHE/CHaP_Report_No__20_Final__with_links_.pdf#page=37) (last visited Jun. 21, 2016).

<sup>18</sup> Norman Myers, *Environmental Refugees: A Growing Phenomenon of the 21<sup>st</sup> Century*, 357:1420 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y LONDON B 609, 609 (2002). Because of the scarcity of data, different predictions have been made as to the number of those who will be displaced. Stern (2006) predicted that by 2050, we will see around 200 million “climate refugees”. UNFCCC had predicted that by 2010, 50 million people would be “environmentally displaced”. UNHCR reports that in 2002, 24 million people fled because of floods, famine, and other environmental disasters.

<sup>19</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2013: THE PHYSICAL*

human welfare is much more severe than the average climate.<sup>20</sup> A degradation of the environment coupled with existing vulnerabilities especially has its toll on those with limited adaptive capacities and livelihoods that principally depend on the climate system.<sup>21</sup>

Concern that climate change induced environmental events will continue to produce human movements and displacements around the world has naturally sparked debates in legal, policy and academic circles on what should be done to address the plight of those who migrate or are displaced because of events that have *resulted from* or become *aggravated by* climate change.<sup>22</sup> There is a general agreement that this presents a challenge to current legal and institutional arrangements. The concern is that relationship between the host community and the migrating community could result in conflict because of competition for scarce resources. In particular, if the movement occurs across borders, it creates a dilemma at the intersection of two areas that are always bound to create controversy, immigration law and climate change law.<sup>23</sup> The discussions and debates on the appropriate responses dance around

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SCIENCE BASIS (Cambridge Univ. Press 2014).

<sup>20</sup> Camille Parmesan et al., *Impacts of extreme weather and climate on terrestrial biota*. Bulletin of the American Meteorological Society, 81(3), 443-450. (2000). Also available at <http://search.proquest.com/docview/232630599?accountid=10267> (last visited Mar. 11, 2016). Parmesan et al. attribute the reduction of the natural system's resilience to changes in climate to increased human dominance of the natural landscape, and the shrinking of natural ecosystems, which limits the ability of the natural system to respond to rapid changes in the climate system.

<sup>21</sup> See Chris Wold et al., CLIMATE CHANGE AND THE LAW 107 (2009). Chris Wold et al. mention as an example the 100 people from the village of Lateu in Vanuatu who were forced to permanently evacuate from their homes to higher ground because of frequent and intense storm surges caused by global warming. They were the first communities forced to migrate because of climate change- in popular media given the label "climate refugees". This was made possible thanks to technical and financial support provided from the United Nations Environmental Program (UNEP).

<sup>22</sup> Throughout this dissertation I have used the term climate change induced migration loosely to describe such movement (hereinafter CCIM).

<sup>23</sup> See JANE MCADAM, CLIMATE CHANGE AND DISPLACEMENT (Bloomsbury Publ'g 2010). Katrina M.

questions of immigration regulation, the appropriate terminology to be used, the rights and protection needs of those who migrate or are displaced and how to balance the needs and rights of host communities and migrating communities.<sup>24</sup>

This dissertation engages with relevant law and social science literature on what an adequate legal or policy response for climate change induced migration (CCIM) looks like and the theoretical justification for such a response. It critically examines major proposals for responses, which broadly fall into four categories: creative interpretation of the existing law, amendment of an existing law, adoption of a completely new instrument, and an alternative approach combining different strategies.

Arguing that CCIM is absent from existing law, a growing body of literature champions for the adoption of a new multilateral regime explicitly and exclusively governing CCIM and bestowing rights on those who become displaced.<sup>25</sup> Others however, point out that negotiating such an instrument would not only be infeasible,

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Wyman, *Responses to Climate Migration*, 37 Harv. Envtl. L. Rev. 167 (2013). Vikram Kolmannskog, *Climate of Displacement, Climate for Protection?* (Dec. 2008). Bonnie Docherty and Tyler Giannini, *Confronting a Rising Tide: a Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009), Oliver Brown, *Migration and Climate Change*, 31 IOM INT'L ORG. FOR MIGRATION (2007).

<sup>24</sup> For e.g., a 2009 report published by the International Organization for Migration underscores the complexity of the underlying issues involved in conceptualizing environmentally induced movement and identifies political instability, conflict, lack of opportunities, and lack of access to resources as “key drivers of migration”. See, Frank Laczko and Christine Aghazarm eds., *MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE*, IOM Report, 48 (2009), [http://publications.iom.int/system/files/pdf/migration\\_and\\_environment.pdf](http://publications.iom.int/system/files/pdf/migration_and_environment.pdf) (last visited Mar. 11, 2016).

<sup>25</sup> See, JANE MCADAM, *CLIMATE CHANGE AND DISPLACEMENT* (Bloomsbury Publ'g 2010); Katrina M. Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167 (2013); Vikram Kolmannskog, *Climate of Displacement, Climate for Protection?* (Dec. 2008); Bonnie Docherty and Tyler Giannini, *Confronting a Rising Tide: a Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009); Oliver Brown, *Migration and Climate Change*, 31 IOM INT'L ORG. FOR MIGRATION (2007).

but also ineffective and useless. Instead, they advance the idea that the existing system, if properly interpreted and implemented, could provide meaningful protection.

After having conducted brief studies of three regions classified as climate change hotspots, this study confirms that environmental degradation is rarely, if ever, a singular driver of displacement. For this reason, going beyond the physical event and trying to understand and address underlying vulnerabilities before attempting to formulate effective legal and policy responses is of utmost importance.<sup>26</sup>

The study shows that there is no one single solution to the problem and concludes that a multi-sectoral approach combining different strategies presents the best alternative. The following sections will explain the details of the questions that this research set out to investigate and the methods it used to go about answering those questions.

## ***2. Presentation of Issues and Research Questions***

The displacement of individuals and populations because of environmental disasters linked to climate change has raised concern on the adequacy of the existing legal and policy framework to deal with the displacement. Given the seriousness of the implications of climate change for the present and future generations, the query of this dissertation broadly conceived is how human mobility caused by climate change or incidental to climate change fits within law and policy at the domestic, regional and international level. For the sake of convenience, I have broken down the main research question into conceptual, normative and practical questions as follows.

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<sup>26</sup> For e.g., a 2009 report published by the International Organization for Migration underscores the complexity of the underlying issues involved in conceptualizing environmentally induced movement and identifies political instability, conflict, lack of opportunities, and lack of access to resources as “key drivers of migration”. See, Frank Laczko and Christine Aghazarm eds., *MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE*, IOM Report, 48 (2009), [http://publications.iom.int/system/files/pdf/migration\\_and\\_environment.pdf](http://publications.iom.int/system/files/pdf/migration_and_environment.pdf) (last visited Mar. 11, 2016).

## **i. Conceptual Questions**

This dissertation conceptualizes climate change induced human mobility via social science theories on disaster vulnerability and cosmopolitanism, since, any discussion on responses needs to be prefaced with an understanding of the phenomenon itself. Simply stated, the first question addressed by the dissertation is why people move or are displaced. This question is two pronged pointing to both typology of the environmental hazards giving rise to movement and terminology- how to characterize the movement and how to address people who migrate because of the effects of climate change- are they “migrants”, “displaced persons” or “refugees”? The nuances in terminology say something about where on the spectrum between forceful or voluntary the movement lies, and this is instrumental in determining what rights are conferred.

First, from a purely physical- environmental perspective what causes movement, how do we conceptualize the climate change and displacement nexus? I look for answers in the physical science literature on whether there is a clear and straightforward nexus between climate change and movement.

Next, what is the vulnerability and movement nexus? What makes people vulnerable? If a complex set of underlying socioeconomic and political issues interact with an environmental event to cause movement, how should we conceptualize the movement: in terms of vulnerabilities or in terms of climate change?

Lastly, in order to conceptualize the nature of the problem as a justification for possible responses, I resort to a cosmopolitan approach. I ask whether CCIM can be seen as a problem of cosmopolitanism. What do we gain by characterizing it as such?

## **ii. Normative Questions**

The main normative question is, what does an adequate policy or legal response for CCIM look like and what is the theoretical justification for such a response? The dissertation breaks down these questions into the major categories; the first set of questions examine the existing arrangement and the second set of questions look at response proposals premised on the assumption that the existing law is inadequate.

To answer the question of whether the legal-institutional framework of current international law adequately responds to CCIM (structurally, practically and theoretically), the dissertation examines international refugee law, international human rights law and environmental law. The question is whether there are possibilities for protection in the existing law, and whether these avenues for protection are adequate.

First, are there any rights and do the rights, as articulated in the law meet the protection needs and wants of those who are displaced because of climate change? Besides the right to remain in a certain place, does the law also provide for international assistance and funding for the domestic support and resettlement programs of affected countries? A question of terminology- how do we conceive the rights-holders? I ask how each of these regimes conceives vulnerability. Does the conceptualization of vulnerability that is embodied in the law meet the needs and wants of those who are affected? Do their underlying conceptual principles speak to the complexities as per the theories discussed in conceptualizing CCIM in the previous questions?

Lastly, I ask whether these regimes accurately characterize the nature of the movement/ displacement- its transboundary cause, its consequences and do the regimes call for a burden sharing that is in line with the cosmopolitan

conceptualization of climate change induced migration that I made previously.

When we turn to the second set of normative questions, if interpretation of the existing law leaves us with no meaningful response in light of vulnerability theory and a cosmopolitan understanding of CCIM, what are the pros and cons of the other proposals, i.e. creation of a new multilateral regime dealing specifically with CCIM, amending the existing regimes discussed previously or another alternative? Would amending the existing law provide adequate protection to climate change migrants or would the general or specific limitation in scope of the regimes hinder meaningful protection? Would the adoption of a novel stand-alone multilateral instrument get enough support from states?

### **iii. Practical Questions**

The practical questions of the dissertation are on what is happening in certain areas of the world, and the recent developments in this realm, as seen in the efforts of state and non-state actors, recommendations, soft law instruments, and the evolving jurisprudence of New Zealand courts on this issue.

First, I ask if there is a pragmatic way to find a unifying factor; whether the types of movement, the needs and wants of climate change migrants are similar across the globe. In particular, what is the nature of climate change induced human movement in three countries; Eritrea, Bangladesh and Kiribati? Based on the stories of the different affected groups, can we extract a meaningful “least common denominator” of experiences for CCIM and could this lead us to formulate a system of remedies that works for all?

Next, in light of the recent activities of a number of initiatives (e.g. the Nansen

Initiative, Displacement Solutions), what role are these traditional and non-traditional international actors (non-state entities) playing in the generation of norms on CCIM? Could these efforts be described as cosmopolitan? What is the legal nature of the outcome documents produced by non-traditional actors? How do we determine their legitimacy?

### **3. Research Methodology and Methods**

In this dissertation I use a combination of descriptive, critical and normative methodologies to address the research questions posed in the previous section. My descriptive approach is what Robert Cryer et al. describe as expository methodology—one that “answers questions about the way the legal world is”.<sup>27</sup> My critical and normative approaches, on the other hand, are what Cryer et al. call “evaluative”. While my critical approach appraises “implicitly and explicitly” the law’s adequacy “from an external viewpoint”, my normative approach proposes suggestions for improvement based on the “identified shortfalls”.<sup>28</sup> My approach is to integrate already existing theories- vulnerability theories to my own qualitative research and I use these theories to evaluate the adequacy of the existing legal framework and make conclusions.

#### **i. Descriptive approach**

I use a descriptive approach to address two issues.

First, I take a descriptive approach to provide an overview of the magnitude of the problem of CCIM and to paint a clearer picture of how communities and individuals

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<sup>27</sup> Robert Cryer et al. RESEARCH METHODOLOGIES IN EU AND INTERNATIONAL LAW. Oxford: Hart (2011).

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

are affected to try to understand the type of vulnerabilities experienced pre-movement, during movement and post-movement.

I use both primary and secondary sources for this purpose. My primary sources are interviews, both formal and informal. I interviewed I-Kiribati nationals<sup>29</sup> and climate change activists who live with the reality of the effects of climate change on a daily basis. I met them through a social media community called “Humans of Kiribati”<sup>30</sup>, a platform for I-Kiribati people to post pictures and to tell their stories. Some of these include stories on how the effects of climate change are affecting their lives.<sup>31</sup> I also interviewed a filmmaker, Michael Nash, who traveled around 48 countries chronicling ways in which climate change is affecting people’s lives and causing displacement and made one of the first documentaries which helped publicize the reality of climate change induced movement.

In addition, I was able to interview Eritrean asylum seekers in Israel about their perilous journey to Israel.<sup>32</sup> This will help to understand the types of vulnerabilities experienced during movement. These informal conversations were conducted in August 2013, as part of the research and translation work that I did for an episode for

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<sup>29</sup> These include interviews with Ross Maitinnara, Lulu DeBoar, and Mike Roman.

<sup>30</sup> See <https://www.facebook.com/humanofkiribati/?fref=ts> (last visited Jun. 21, 2016).

<sup>31</sup> I use images from the online community “Humans of Tuvalu” as well but to a lesser degree, as the purpose of this community is to show a different side of Tuvalu- other than just the impacts of climate change. Available at <https://www.facebook.com/Humans-of-Tuvalu-HOT-1390612091206712/photos> (last visited Jun. 21, 2016). This community is owned/ administered by Paufi and Mati- sisters who do amateur photography and they have given me permission to use their stories.

<sup>32</sup> The story was about how some Bedouins in the Sinai desert captured and kept these individuals in captivity, and tortured them for a ransom. With the rise of ISIS, it is even more dangerous for refugees and asylum seekers in the Northern African region than it was in 2013, when we worked on this story. I am not able to release the names of the two men that I talked to, because of confidentiality, but I can share their experiences.

“This American Life”, entitled “This Call May be Recorded... to Save your Life”.<sup>33</sup>

My secondary sources for this purpose include scientific articles, reports by intergovernmental organizations, such as the International Organization for Migration (IOM)<sup>34</sup>, World Meteorological Organization (WMO), the UNHCR, and the IPCC- especially the IPCC’s policy oriented reports from 2007 and 2013, as well as reports by non-governmental organizations (NGOs), such as Displacement Solutions and academic journal articles.<sup>35</sup> This helps to conceptualize the phenomenon of CCIM and to show the complexities of the vulnerabilities that give rise to displacement. These reports shed light on the causes of the movement, the strengths and weaknesses of the practical responses that were made, the lessons to be learnt from the various incidents. I compare the regional studies and try to find a commonality, common elements that unite the groups that were displaced, e.g. economic conditions, political system that favors certain groups at the expense of other groups, responses made by governments or influenced in part by government, and responses made by NGOs, intergovernmental organizations (IGOs), and local civil society groups. Even though this is not firsthand collected information, the information obtained from secondary sources is strengthened by resorting to overlapping reports from different sources.

The second issue that I explore through a descriptive approach is the question of what international law says about CCIM- how CCIM fits within the general framework of international law and the specific regimes of human rights and environmental law.

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<sup>33</sup> The full episode is available at <http://www.thisamericanlife.org/radio-archives/episode/502/this-call-may-be-recorded-to-save-your-life> (last visited Jun. 21, 2016).

<sup>34</sup> I have also had an email exchange with Mr. Daniel Salmon, program officer for Migration, Disaster Risk Reduction and Climate Change at the IOM.

<sup>35</sup> Displacement Solutions is an international NGO that provides assistance to displaced persons because of environmental disasters. *See* <http://displacementsolutions.org/> (last visited Jun. 20, 2016).

Through creative interpretation of the relevant regimes, I show some possibilities for protection for CCIM. I examine the text of multilateral international instruments, including the United Nations Framework Convention on Climate Change (UNFCCC), UN Refugee Convention, Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), regional instruments, such as the African Charter on Human and Peoples' Rights, the Cartagena convention, the European Convention on Human Rights and Organization of African Unity (OAU) Convention governing Specific Aspects of Refugee Rights, and the Cartagena Declaration on Refugees to examine their adequacy in light of providing protection in the context of CCIM (my primary sources).

## **ii. Critical approach**

I follow up on the findings of my expository study with an evaluation of the current law through the lens of vulnerability theory and a theory of cosmopolitan justice.

I carry out this analysis through a brief micro history of the formation and transformation of the refugee regime and international climate change law regimes. In particular, I examine historical documents (the *travaux préparatoires* of the instruments), and legal scholarship written on the regimes, as well as the recent developments on the UNFCCC- based on the outcome documents of the Conference of the Parties (COP) of the UNFCCC. The objective is to show that the existing system does not adequately capture the complexities of the vulnerabilities inherent in climate change induced migration, i.e. to show the inadequacy of the existing system through the sociological theory of disaster vulnerability.

### iii. Normative Approach

I also use an evaluative approach to assess the advantages of using soft law and a combination of different strategies. I use a cosmopolitan lens to assess the role played by traditional nontraditional international actors in influencing policy and lawmaking. In order to do this, I use observation, participation in standard setting exercises, email conversations and formal interviews with the actors shaping the discussion, trying to reinterpret the law and setting the agenda for climate change induced migration.

First, I rely on my personal observations at the International Law Association (hereinafter ILA) Committee Meetings (Sea Level Rise Committee and Climate Change Committee) at the joint International Law Association-American Society of International Law (hereinafter ASIL) Conference<sup>36</sup> conducted in Washington DC in April 2014. I participated in the meetings and was able to see how CCIM was being discussed and put on the agenda.

My interviews for this purpose were with Scott Leckie<sup>37</sup>- founder of Displacement Solutions, an international NGO, Atle Solberg, head of the Nansen Initiative<sup>38</sup> Secretariat, Alice Thomas, Climate Displacement Program Manager for Refugees

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<sup>36</sup> As per the official website of the ILA, the ILA was formed in Brussels in 1873 with the objective to "[study, clarify and develop] international law, both public and private, and [to further] international understanding and respect for international law". See <http://www.ila-hq.org/> (last visited Jun. 30, 2016).

<sup>37</sup> Scott Leckie interestingly refers to himself as a cosmopolitan. Personal Interview with Scott Leckie, Director and Founder, Displacement Solutions (Mar. 10, 2016).

<sup>38</sup> Pursuant to an email exchange with Walter Kaelin, the envoy of the Nansen initiative, "it was a state-led process with a Steering Group composed of Australia, Bangladesh, Costa Rica, Germany, Kenya, Mexico, Philippines and chaired by the governments of Norway and Switzerland." And it ended its first stage in December with an endorsement of a protection agenda document. The official website describes it as "a bottom-up, state-led consultative process with multi-stakeholder involvement." See, <https://www.nanseninitiative.org/> (last visited Jun. 21, 2016).

International<sup>39</sup> and Dr. Michael Kidd, attorney to an I-Kiribati citizen who claimed refugee status in New Zealand because of climate change<sup>40</sup>.

In addition to interviews, I was able to have email conversations with Walter Kaelin, envoy of the Nansen Initiative, Carole Curtis, attorney to a Tuvaluan family who was granted residence in New Zealand with climate change as a reason for a claim, and Pulitzer Prize winner journalist, Kenneth Weiss<sup>41</sup>,

The documentary sources I refer to are the Peninsula Principles<sup>42</sup>, the Nansen Initiative's outcome documents of certain regional consultations conducted by the Nansen Initiative<sup>43</sup>. These documents will help to show the willingness of states to accept principles and guidelines for protection as long as it does not involve binding obligation.

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<sup>39</sup> See <http://www.refugeesinternational.org/people/> (last visited, Jun. 30, 2016).

<sup>40</sup> Michael Kidd is an attorney and a pastor in New Zealand. There is more information about him on his website, <http://kiddlegal.com/> (last visited June 21, 2016). The case was *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* (2015).

<sup>41</sup> He interviewed and wrote an extensive article on Ioane Teitiota and covered the United Nations climate negotiations in Paris last year for *Nature* magazine.

<sup>42</sup> These were developed by the NGO Displacement Solutions. See <http://displacementsolutions.org/> (last visited Jun. 20, 2016).

<sup>43</sup> See, Nansen Initiative, *Protection Agenda Vol I, and Vol II*, <https://www.nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> (last visited Mar. 21, 2016).

#### **4. Significance of the Study**

This dissertation is timely because the effects of climate change will continue to be felt around the globe, notwithstanding our best mitigation efforts. There remains uncertainty on the exact details of the warming, due to the complexity of the processes involved and lack of information about the possible changes in human behavior and the impact they will have on the climate.<sup>44</sup> The continued occurrence of climate related extreme weather events with dramatic intensity and frequency and the consistent increase in slow onset disasters will continue to impact the lives of many populations.

Although there is a general agreement that there is a need to take action to address climate change induced migration, consensus on the form of action has not been reached. The present research arises from the concern that the recommendations ignore or deemphasize some important dimensions of the movement and not having a full picture of the issues and underlying vulnerabilities would result in inadequate or inefficient responses. In light of this, the present work seeks to contribute to the emerging legal and policy scholarship on climate change migration in the following ways.

Although currently conversations about the impacts of climate change are being undertaken at the international and regional level, there is no central/ consensus on how to deal with the problem. While some argue for a protocol or a convention which provides protection to climate change migrants in the same way that protection is granted to refugees, others oppose this and push for “targeted” regional measures

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<sup>44</sup> ROBERT HENSON, *THE THINKING PERSON’S GUIDE TO CLIMATE CHANGE*, 5 (Am. Meteorological Soc’y 2014).

through bilateral and multilateral agreements. Conversations about climate change's impacts and questions of environmental justice are being discussed in international dialogues. Some non-traditional international actors are intervening in the conversations that are taking place- in international forums such as the COP of the UNFCCC and various initiatives and research projects that have been undertaken by different bodies.

The research differs from previous scholarship in that it will examine the development of international environmental law on climate change adaptation and it will consider how it has been influenced by the conceptualization of international law. It will challenge traditional conceptions of the legitimacy of international law predicated on liberal notions of justice and on the sovereignty of states. It will examine how these have been counterproductive to progress in international climate change regime. Paradoxically communities that are most likely to be hardest hit by global warming have little or no voice in the climate policymaking discussions. They are thus forced to take whatever standards and rules are established by people in suits and ties. Diverging inter-state and intra-state interests and, internal socioeconomic and political inequalities exacerbate the non-representation of those that suffer the harrowing consequences of climate change. The main questions that have been addressed by legal scholars so far have been on how the law should respond to the problem: i.e. how we should fill the legal and practical gaps.

The present research also traces the development of international environmental law on climate change adaptation and mitigation, to see to what extent it has been influenced by the conventional conceptualization of international law predicated on liberal notions of justice and state sovereignty.

The existing literature tries to establish a link between migration and climate change: however a straightforward link between climate change and migration cannot be established. Disasters are a result of the interaction of socioeconomic and political factors and environmental problems. A lot of these studies fail to take into account the uniqueness of the type of disaster in whether someone will move or not. Better understanding of the vulnerabilities that cause migration in the first place in order to come up with effective responses to climate change induced migration- from vulnerability theory.

Recognizing the need for an understanding of the phenomenon and for formulating appropriate legal and policy responses, this dissertation attempts to provide an alternative way of thinking and writing about international refugee law through an understanding of vulnerabilities. The study is premised on the idea that understanding climate change induced migration is dependent on an understanding of vulnerability, compulsion and responsibility. A determination of vulnerability- to what extent individuals are in need of protection helps to answer the question of who is entitled to protection- what duties are owed to those that move and why these duties are owed to them. This opens a conversation about whether climate change migration is any different from economically motivated migration.

The proposals say what avenue of protection should be provided but do not provide strong philosophical justifications for why duty is owed to those who are affected. The liberal conception of justice values individual rights over community rights. It fails to take into account the history and culture of certain communities which value the

community over the individual. Hence the research questions the legitimacy of individual rights based laws. This could also solve the conundrum of finding a nexus between displacement and climate change and/ or isolating climate change from the myriad other reasons that induce movement. These communal rights empower communities and an analogy could be drawn from communal ownership of land. For this reason, sticking with the traditional conceptions of international law which has not been well-equipped to deal with the variety of issues that have arisen regarding international environmental justice may be counterproductive for the purposes of securing rights for communities affected by climate change induced migration. Environmental justice suggests that whatever response is adopted needs to be based on procedural as well as substantive fairness. Procedural fairness in international law has traditionally been based on recognition of sovereign equality of states and equal participation of all states. However, this research will argue that governments do not always adequately represent the interests of people groups (communities) in international negotiations. For this reason, any meaningful response should be based on recognition of the diversity of the affected communities and their participation in the political processes for management of the harm. This research hence, seeks to propose a means to recognizing the communities that are severely affected and allowing them to participate in the discussions leading up to a solution. Taking into account the fact that people living in the same region usually have similar cultural, linguistic and social experiences and that migration will be mostly within regions, regional responses would be more effective than international responses. In the context of Africa, where state borders are merely colonial creations, homogeneous communities live straddling state borders. Whenever there is a common problem, some West African communities that are living on both sides of a border have been known to get together in the wake of a communal problem to search for a common

solution. This bottom-up decision making model can ensure more participation on the part of those that are affected. Instead of adopting a one size fits all instrument as is being suggested by many, this will allow communities to participate and come up with a sui generis solution that is best fitted for their situation.

The research also seeks to contribute to international law scholarship by showing that climate change in general and climate change induced migration in particular destabilizes the artificially constructed boundaries between disciplines and between different areas within the legal field. It shows the artificial nature of the carefully constructed boundaries between different areas of international law, such as climate change law- refugee law- human rights law. The work also contributes to the dialogue on the increasing involvement of non-state actors in shaping international law- and more visibly through their active involvement in the conception, creation and implementation of the law on climate change and migration law.

## **5. Structure of the Dissertation**

The introduction laid the background for the project and introduced the research problematic and research methodologies used.

Chapter two and chapter three try to contextualize and conceptualize CCIM. I start chapter two by outlining the physical scientific basis for understanding climate change and its potential to cause displacement based on reports from various sources. I then discuss the evolution of sociological theories on migration, disasters and vulnerability to try and get a sense of what causes people to migrate or be forcefully displaced. Based on these theories, one comes to the finding that movement like this is multifaceted. Except in the case of sudden onset disasters, there is no single driver of displacement. Rather, more often than not, political and social forces interact with an

environmental condition/ event and this interaction creates vulnerability. This multidimensional nature of climate change shows that its effects are rarely indiscriminate.

In the last part of chapter two, I characterize CCIM as a problem of cosmopolitan justice. This chapter poses the question of responsibility, given the difficulties associated with establishing a direct causal link between climate change and migration, the potential transnational ramifications on, inter alia, security, human rights and development and the disproportionate impact of climate change migration on communities with limited adaptive capacities. Drawing on theories of justice, I argue cosmopolitanism as the basis for climate change justice for internal and transnational migrants. I propose a rights-based cosmopolitan solution based on Martha Nussbaum's "capabilities approach". Whereas Westphalian state sovereignty imposes responsibility on individual governments to protect citizens displaced because of climate change related disasters, the cosmopolitan ideal- with Nussbaum's "capabilities approach", ensuring environmental justice for internal and transnational migrants alike.

Chapter three tells three stories of human vulnerability to climate change and displacement from Eritrea, Kiribati and Bangladesh. All three nations are very poor and undeveloped and were former colonies of European powers. Through these stories, I try to draw an experience based picture of the different scenarios and to understand the needs and wants of those who are affected. Thus, chapter three proves that what is actually happening on the ground fits with the theoretical frame that I have outlined in the second chapter- that vulnerability has many different facets across geography, social and political lines. The stories also establish a clear correlation not only between movement and climate change, but also between socioeconomic and

political position and movement, demonstrating that movement is a function of socioeconomic and political factors of the populations involved and not uniquely a product of the physical factor.

In chapter four, we see that although there are protections provided by soft law, there is no binding law that explicitly protects people who migrate because of climate change. I present a critical analysis of the way vulnerability is conceived in already existing protection regimes and assess its inadequacy and its limitations in light of the complexities of climate change induced migration. I trace the history of the law and find the underlying theories informing the basic principles and provisions contained in the instruments, which do not necessarily address the needs of climate change migrants. There are arguments that resorting to creative interpretation of existing treaty or customary international law avoids the difficulties associated with garnering political support for a new instrument. However, the substantial and procedural inadequacies of the relevant areas of international law make it a poor option. The chapter also looks at case law from Australia and New Zealand, where there seems to be both hope and hopelessness in recognition of the need to provide assistance for CCIM.

In the fifth chapter, I look at the hurdles in advocating for the adoption of a new standalone multilateral treaty or the adoption of a protocol to already existing regimes, such as the international refugee law or UNFCCC tying back to the conceptualization of climate change movement and the highly politicized debate on climate change. If past climate change negotiations are any indication, garnering consensus on climate change related issues is a nearly impossible and frustrating process. Opting for a protocol linked to an already existing instrument, such as the UNFCCC or the Refugee Convention could arguably garner support more easily than a standalone treaty but

working within the already existing frameworks could limit the scope of the new protocol to that of the already existing instrument. Agreement may be reached on the lowest terms possible, rendering the type of protection dilute.

In the last part of chapter five, I examine new developments, current initiatives and movements by state and non-state actors that are trying to make visible the plight of climate migrants and they reveal that states seem to be more open to non-binding soft law and guiding principles, rather than the idea of adopting a completely new instrument.

The dissertation concludes with the recommendation that there is no one panacea to climate change displacement, as the drivers of displacement are diverse and complicated. Accordingly, it recommends a combination of different strategies, emphasizing on the vulnerabilities that give rise to displacement and the participation of the displaced as well as the host populations in the areas where the displaced relocate to. This could provide a particularized and socially just response.

## CHAPTER 2

### A MULTIDIMENSIONAL CONCEPTUAL FRAMEWORK FOR CLIMATE CHANGE INDUCED MIGRATION

History is replete with stories of human migrations, which in addition to eliminating cultural and ethnical boundaries brought about great technological, socioeconomic, and political changes that marked human progress. Since time immemorial, populations have been known to migrate for various reasons, either voluntarily or involuntarily, shaping and reshaping history and changing the composition of societies. In this sense, environmentally induced human mobility is nothing new. What is new, however, is the unprecedented scale at which it is occurring and is projected to occur in the near future. Moreover, the question of what happens to citizens of some small island states once they become completely uninhabitable is still a big dilemma. Although there is recognition that mobility is one of the normal ways that humans have adapted to changes in their environment, laws still restrain free movement within and across states. In this chapter, I provide a hybrid conceptual frame from sociological theories of vulnerability and ethical cosmopolitanism in order to understand the phenomenon of climate change induced migration and to lay the ground work for a normative analysis in the later parts of the dissertation.

I use the first conceptual frame- vulnerability theory- to address the issue of causation- what causes people to move or be displaced? Sociological theories of migration talk about a pull-push mechanism, where unfavorable conditions push someone from an area and favorable conditions pull to another area. This chapter investigates the “pull” factors and what are the “push” factors in the case of CCIM. I advance the idea that while a lot of proposals advocating the adoption of a multilateral legal instrument to

address CCIM focus mostly on the physical aspect of the environmental harm as “push” factors, there are a lot of underlying issues that are as important or even more important than the physical aspect that seem to get glossed over or ignored. We should thus be speaking in terms of vulnerabilities, i.e. the underlying socioeconomic and political situations that interact with an environmental harm as opposed to solely the physical-environmental harm. Understanding the reason for movement helps to critique inadequate legal and policy responses and also to formulate a response that are effective and meaningful.

I use my second conceptual frame- ethical and legal cosmopolitanism to advance a theory of responsibility and justice for CCIM, embracing humanity’s one-ness, the intrinsic value of all human beings, and elements of intergenerational and intra-generational justice. This is in contrast to reparative justice, which in the case of climate change lends itself to attack. My theory of cosmopolitanism does not reject the sovereignty or the role of the nation-state but rather complements it by embracing also the growing role of non-state actors in policy and lawmaking in the global realm, especially concerning environmental matters. This vision of cosmopolitan jurisprudence also provides a philosophical justification for soft law and non-law instruments which notwithstanding their non-binding status (or even because of it) arguably have “de facto legitimacy”.

The chapter begins with an overview of the scientific- environmental aspects of CCIM, then goes to the sociological theories of vulnerability and ends by advancing a theory of cosmopolitanism for CCIM.

## **1. Understanding the Reason for Movement from a Physical (Scientific) Perspective**

*Scientific evidence for warming of the climate system is unequivocal.*

- Intergovernmental Panel on Climate Change<sup>45</sup>

That climate change is a hot and highly politicized issue goes without saying. Policy making is shaped by contentious debates, on *inter alia*, the reality of climate change, and whether it is caused by anthropogenic activities or it is the product of natural processes, what its consequences are, and what our responsibilities are towards one another and towards the earth. The denials on the reality of climate change however, are more prevalent among policy makers rather than among climate scientists. NASA climate and atmospheric scientists confirm that “the evidence for rapid climate change is compelling” and that there is a consensus among 97% of climate scientists that human activities have caused or increased the rate at which it is occurring.<sup>46</sup>

Keeping that in mind, in the following few pages, I outline how scientific understanding on climate change has evolved over time and provide a brief summary of the most widely accepted contemporary scientific understanding of what climate change is, how it affects ecosystems, and how it impacts human lives.<sup>47</sup>

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<sup>45</sup> IPCC, Climate Change 2007: Synthesis Report, Summary for Policymakers, available at NASA, Global Climate Change, Vital Signs of the Planet (2007), [https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf) (last visited Mar. 22, 2016).

<sup>46</sup> NASA, Global Climate Change, Vital Signs of the Planet, available at <http://climate.nasa.gov/causes/> (last visited Mar. 22, 2016).

<sup>47</sup> Sometimes, the words climate change and global warming are used interchangeably. The NOAA

## i. The Causes

Climate scientists define climate change as the response of the earth's climate system to altered concentrations of greenhouse gases (GHGs) in the atmosphere.<sup>48</sup> Sometimes the term climate change is used synonymously with global warming and erroneously the greenhouse effect.<sup>49</sup> What is causing global warming is not the "greenhouse effect" per se, but rather an acceleration or "expansion" of the greenhouse effect and many climate scientists say that the current warming trend is because of human activities.<sup>50</sup> The Intergovernmental Panel on Climate Change (the IPCC) has also established a clear correlation between human activities and the earth's climate.<sup>51</sup>

The greenhouse effect is a natural homeostatic process which ensures that the earth is

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National Weather Service defines climate change as "[ ] a long-term shift in the statistics of the weather (including its averages). For example, it could show up as a change in climate normal (expected average values for temperature and precipitation) for a given place and time of year, from one decade to the next", <http://permanent.access.gpo.gov/gpo10824/Climatechange.pdf> (last visited Jun. 21, 2016).

<sup>48</sup> See <http://www.nasa.gov/audience/forstudents/k-4/stories/nasa-knows/what-is-climate-change-k4.html> (last visited Mar. 22, 2016). The climate system is a system including land, atmosphere, ecosystem and water on the earth's surface. Greenhouse gases are gases found in the atmosphere which have the capacity to absorb radiation.

<sup>49</sup> Global warming is an increase in average global temperatures, a phenomenon resulting from increased concentrations of greenhouse gases in the atmosphere, assuming other variables are held constant.

<sup>50</sup> <http://climate.nasa.gov/causes/> (last visited Mar. 22, 2016).

<sup>51</sup> Wold, *supra* note 21 at 2.

The United Nations Environmental Program (UNEP) and the World Meteorological Organization (WMO) founded the Intergovernmental Panel on Climate Change (IPCC) in 1988. Originally, the IPCC had the task of gauging the scientific, technical and economic basis of climate change policy in preparation for the 1992 Earth summit and the negotiations of the United Nations Framework Convention on Climate Change (UNFCCC). The climate talks of the Conference of Parties held every year as per the UNFCCC's provisions reflect an acknowledgment on the part of the international community of the urgent need to respond to the threat that climate change presents. The IPCC continues to make technical reports available to the States Parties to the UNFCCC and to the public at large.

warm enough to sustain life as we know it.<sup>52</sup> Complex natural cycles keep the concentration of GHGs in the atmosphere relatively constant.<sup>53</sup> The sun's rays, after reaching the earth's surface are reflected back into the atmosphere.<sup>54</sup> Particles in the atmosphere including water vapor, gases such as carbon dioxide and methane absorb a portion of the sun's energy before it is radiated back into space.<sup>55</sup> The name "greenhouse effect" was given by the scientist Fourier, who saw that the energy reflecting from the earth was trapped in the atmosphere in the same way that greenhouses would insulate the air inside them.<sup>56</sup>

Therefore, at the root of this drastic change in climate recently is an increase in the concentration of man-made GHGs, dust, soot, Sulphur and other particles in the atmosphere.<sup>57</sup> These particles either reflect or absorb incoming solar radiation, which

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<sup>52</sup> NASA, Global Climate Change, Vital Signs of the Planet, <http://climate.nasa.gov/causes/> (last visited Mar. 21, 2016).

<sup>53</sup> For instance, carbon dioxide, an important GHG is absorbed by plants and released when they decompose. It gets reabsorbed when new plants grow and is released when they die and decompose in an endless cycle.

<sup>54</sup> NASA, Global Climate Change, Vital Signs of the Planet, <http://climate.nasa.gov/causes/> (last visited Mar. 21, 2016).

<sup>55</sup> *Id.* See also, BBC, A Brief History of Climate Change (Sept. 20, 2013), <http://www.bbc.com/news/science-environment-15874560> (last visited Jun. 30, 2016). Joseph Fourier, a French mathematician and physicist first discovered earth's energy balance. He calculated that if the earth didn't have an atmosphere, the average temperature on earth would be extremely high by day and freezing cold by night. This would make the average overall temperature -18°C (0°F). See also, ROBERT HENSON, THE THINKING PERSON'S GUIDE TO CLIMATE CHANGE (Am. Meteorological Soc'y, 2014).

<sup>56</sup> See HENSON *Supra* note 44. Robert Henson points out that this analogy is not perfect, because earth's atmosphere does not act in exactly the same manner as an actual greenhouse would. He says that a greenhouse made from glass would trap air, the earth's atmosphere does not. It merely absorbs infrared radiation in the particles found in the atmosphere, but this has become a term of art in discussing climate change.

<sup>57</sup> Camilla Toulmin, CLIMATE CHANGE IN AFRICA, 17 (2009).

leads to cooler or warmer conditions.<sup>58</sup>

In the report the IPCC released in 2007, it confirmed with 90% certainty that increase in average temperatures since the mid-20<sup>th</sup> century is attributable to an increase in anthropogenic GHG concentrations.<sup>59</sup> Human influence on the climate system is also visible in positive radiative forcing, observed warming and better understanding of the climate system.<sup>60</sup> Man-made GHGs released into the atmosphere absorb heat more quickly than the “natural sinks” including forests and oceans, interfering with the carbon cycle’s homeostatic process. Hence, between 1750 and 2005 alone, atmospheric carbon dioxide increased by 35% from 280 parts per million to 381 parts per million.<sup>61</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> IPCC WORKING GROUP I, THE PHYSICAL SCIENCE BASIS: SUMMARY FOR POLICYMAKERS (Fourth Assessment Report 2007). Some say that there remains uncertainty on the exact details of the warming, due to the complexity of the processes involved and lack of information about the possible changes in human behavior and the impact they will have on the climate. *See*, Henson, *supra* note 44, at 5.

<sup>60</sup> There has been unparalleled increase in the atmospheric concentrations of carbon dioxide, methane, and nitrous oxide in at least the last 800,000 years. The IPCC reports, “...carbon dioxide concentrations have increased by 40% since pre-industrial times, primarily from fossil fuel emissions and secondarily from net land use change emissions. The ocean has absorbed about 30% of the emitted anthropogenic carbon dioxide, causing ocean acidification. The atmospheric concentrations of the greenhouse gases carbon dioxide, methane and nitrous oxide have all increased since 1750 because of human activity. In 2011, the concentrations of these greenhouse gases were 391 parts per million (is the ratio of the number of gas molecules to the total molecules of dry air. For example, 300 parts per million means 300 molecules of gas per million molecules of dry air.” *See* IPCC Report for Policymakers 9 (2013).

<sup>61</sup> Wold, *supra* note 21 at 5.

## ii. The Evidence

The evidence of climate change, NASA climate scientists say is in the abnormal environmental conditions and events we are witnessing today, including global temperature rise, warming oceans, shrinking ice sheets, declining Arctic Sea ice, glacial retreat, sea level rise, extreme weather events, ocean acidification and decreased snow cover.<sup>62</sup>

The most recent IPCC report stated that the last three decades have had the warmest recorded temperatures since 1850.<sup>63</sup> The IPCC further reports with medium confidence that for the Northern Hemisphere alone, 1983- 2012 were the warmest years for the past 1400 years and that the temperature of the earth's lower atmosphere has been increasing since the mid-20<sup>th</sup> century.<sup>64</sup> In addition to the IPCC, various studies conducted by independent teams of climate and atmospheric scientists report a rise in average global surface temperature.<sup>65</sup> Notwithstanding mitigation measures, Warner et al, warn that a global temperature increase of 2°C or more by 2050 will be unavoidable.<sup>66</sup>

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<sup>62</sup> NASA, Climate change: How do we know? <http://climate.nasa.gov/evidence/> (last visited Mar. 22, 2016).

<sup>63</sup> Climate Change, 2014, the Fifth Assessment Report (AR5) of the United Nations Intergovernmental Panel on Climate Change (IPCC), <http://www.ipcc.ch/report/ar5/syr/>(last visited Mar. 21, 2016). This report was prepared by thousands of scientists, editors and reviewers making references to several thousand peer reviewed scientific studies. This report supersedes the Fourth Assessment Report which had been described as "the largest and most detailed summary of the climate change situation ever undertaken. (Produced by thousands of authors, editors, and reviewers from dozens of countries, citing over 6,000 peer-reviewed scientific studies).

<sup>64</sup> *Id.*

<sup>65</sup> Henson, *supra* note 44, at 3.

<sup>66</sup> Koko Warner et al., Climate Change and Migration: Reflections on Policy Needs, 64 MEA Bulletin-Guest Article (Feb. 27, 2009), <http://www.iisd.ca/mea-1/guestarticle64.html> (last visited Mar. 27, 2016).

In 2007 the United Nations Intergovernmental Panel on Climate Change (IPCC) stated that recently, the world has experienced more extreme weather patterns, including more frequent and more intense rainfall, more intense heat waves and prolonged droughts, alteration of timing and location of rainfall in the past 60 years.<sup>67</sup> Moreover, weather-related disasters (storms, hurricanes, floods, heat waves and droughts) have more than doubled in number over the last 20 years.<sup>68</sup> An expert group which was established in 2008 under the Inter-Agency Standing Committee (IASC) found that over the past two decades, the number of recorded climate related natural disasters has doubled.<sup>69</sup> These include meteorological (e.g. storm), hydrological (e.g. flood) and climatological (e.g. drought) disasters.<sup>70</sup>

Moreover, the top 700 meters of the world's oceans has shown a warming of 0.302 degrees Fahrenheit since 1969.<sup>71</sup> Acidity of the ocean surface has risen by 30 percent since the beginning of the Industrial revolution.<sup>72</sup> The rate at which the top layers of oceans absorb carbon dioxide increases by 2 billion tons per year.<sup>73</sup>

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<sup>67</sup> IPCC WORKING GROUP I, THE PHYSICAL SCIENCE BASIS: SUMMARY FOR POLICYMAKERS (Fourth Assessment Report 2007).

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

<sup>69</sup> *Id.*

<sup>70</sup> The Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Opening Remarks at the Dubai International Humanitarian Aid and Development Conference and Exhibition —DIHAD 2008 Conference, 8 Apr. 2008, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7DHL88?OpenDocument> (last visited Mar. 27, 2016).

<sup>71</sup> Levitus et al, "Global ocean heat content 1955–2008 in light of recently revealed instrumentation problems," *Geophys. Res. Lett.* 36, L07608 (2009).

<sup>72</sup> <http://www.pmel.noaa.gov/co2/story/Ocean+Acidification> (last visited Mar. 22, 2016).

<sup>73</sup> See Copenhagen Diagnosis, p. 36, (2009) available at <http://www.copenhagendiagnosis.org/> (last visited Mar. 22, 2016).

The IPCC says that retreat of glaciers and decrease of ice sheet coverage in the higher latitudes point to a "substantial Arctic warming" since the mid-20th century.<sup>74</sup> In conjunction with the melting of the cryosphere<sup>75</sup> and retreat of glaciers, sea level rise over the past two centuries has been at a higher level than the past two millennia.<sup>76</sup> Between the years 1901 to 2010 the global mean sea level rose by 0.19.<sup>77</sup>

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<sup>74</sup> Climate Change 2014, the Fifth Assessment Report (AR5) of the United Nations Intergovernmental Panel on Climate Change, 7 (IPCC, 2014).

<sup>75</sup> Cryosphere refers to the frozen water part of the Earth system. This includes frozen parts of the ocean, such as waters surrounding Antarctica and the Arctic. *See*, National Oceanic and Atmospheric Administration, *What is the Cryosphere?* <http://oceanservice.noaa.gov/facts/cryosphere.html> (last visited July 13, 2016)

<sup>76</sup> IPCC, *supra* note 74.

<sup>77</sup> *Id.* at 9.

### iii. The Consequences

The impacts of climate change, namely the intensification of ecological, economic, social and other consequences impact on human rights, development and security could result in displacement of populations.<sup>78</sup> As early as 1990, the IPCC had stated that the greatest impact of climate change could be on human displacement.<sup>79</sup>

The continued occurrence of climate related extreme weather events with dramatic intensity and frequency and the consistent increase in slow onset disasters will continue to impact the lives of many populations because of unpredictable global weather patterns, ecosystems, food security and human health.<sup>80</sup> The IPCC estimates that four billion people are vulnerable to the effects of climate change and 500-600 million people – around 10% of the planet’s human population – are at extreme risk.<sup>81</sup> The Global Humanitarian Forum estimates that almost 90 million people require assistance because of the more than 400 weather-related disasters that occur yearly.<sup>82</sup> There are estimates that the number could very well increase to 350 million by 2030.<sup>83</sup>

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<sup>78</sup> See EJF, *No Place like Home-Where next for climate refugees?* ENVIRONMENTAL JUSTICE FOUNDATION 4 (2009), available at [http://www.ejfoundation.org/pdf/climate\\_refugees\\_final.pdf](http://www.ejfoundation.org/pdf/climate_refugees_final.pdf) (last visited Jun. 21, 2016).

<sup>79</sup> IPCC, *Climate Change: the IPCC Scientific Assessment, First Assessment Report* (1990), [https://www.ipcc.ch/ipccreports/far/wg\\_I/ipcc\\_far\\_wg\\_I\\_full\\_report.pdf](https://www.ipcc.ch/ipccreports/far/wg_I/ipcc_far_wg_I_full_report.pdf) (last visited Jun. 21, 2016). The reasons listed include weather events and unfavorable environmental conditions including shoreline erosion, coastal flooding and agricultural disruption.

<sup>80</sup> Wold, *supra* note 21, at 107 (2009).

<sup>81</sup> *Id.* at 1-2.

<sup>82</sup> Environmental Justice Foundation, *No Place Like Home: Where next for climate change refugees?*, (2009), [http://www.ejfoundation.org/pdf/climate\\_refugees\\_final.pdf](http://www.ejfoundation.org/pdf/climate_refugees_final.pdf). Citing, Global Humanitarian Forum (GHF) (2009) Human Impact Report: Climate Change- the Anatomy of a Silent Crisis, Global Humanitarian Forum, Geneva.

<sup>83</sup> See EJF, *No Place like Home-Where next for climate refugees?* ENVIRONMENTAL JUSTICE FOUNDATION 4 (2009), [http://www.ejfoundation.org/pdf/climate\\_refugees\\_final.pdf](http://www.ejfoundation.org/pdf/climate_refugees_final.pdf). (last visited Jun. 21, 2016)

However, the complexities of the processes involved and lack of adequate information on changes relating to human behavior make it hard to make absolute predictions on the exact details of the warming.

Depending on a number of other factors, the ensuing displacement may be either internal- within the borders of the migrants' own country or transnational where the migrants would cross borders to go into a neighboring or any other state. Domestic movement is expected to be more prevalent than transnational movement.

According to the IASC's study, we are faced with two categories of climate change migrants; the first category are people displaced because of sudden onset disasters such as floods, storms, hurricanes and the second, people displaced because of slow onset disasters such as drought.<sup>84</sup> The two categories require different types of assistance. The latter category is in need of permanent relocation as their habitat is no longer sustainable, whereas the former category needs temporary protection until the disaster is over. Another category that Kolmannskog adds to this, is displacement linked to measures to mitigate or adapt to climate change.<sup>85</sup> For example, biofuel projects and forest conservation could lead to displacement if not carried out with full respect for the rights of indigenous and local peoples.<sup>86</sup> This however assumes that all things are held constant. In real life, multiple factors come into play to determine the decision to move.

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<sup>84</sup> Vikram Kolmannskog, *Climate Change, Disaster, Displacement and Migration: Initial Evidence from Africa*, *New Issues in Refugee Research*, Dec. 2009, at 2.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

## **2. Conceptualizing Reason for Movement: Vulnerability**

How we conceptualize CCIM is important because it could inform contextually meaningful and adequate law and policy responses instead of merely technical ones on various aspects of it, including responsibility for losses, causation, prevention and reinstatement. This section conceptualizes CCIM as a function of vulnerabilities borrowing notions from sociological theories on migration, disasters and vulnerability. CCIM has been described as a method of adaptation or evidence of failure of adaptation. I agree with the idea both characterizations are accurate depending on the scale of the disaster experienced. By the word disaster, I mean as defined by the most contemporary disaster theories which emphasize that a disaster is not merely a geophysical or meteorological event but rather a complicated phenomena with social and political implications. Policy and law dealing with adaptation to disaster and more specifically CCIM as adaptation to the effects of climate change should thus reflect this better understanding of vulnerabilities as the cause of disaster.

Throughout the years, vulnerability theory<sup>87</sup> has been used to understand the source of disasters. The evolution of the theory shows that understanding disasters in terms of vulnerabilities helps in the formulation of effective strategies to respond to disasters (although prevention of the physical hazards is outside the control of human beings, at least we are able to mitigate or even avoid disasters). Vulnerability theory can help understand CCIM and help in the formulation of adequate responses. CCIM is sometimes a form of adaptation (a capability) or it could be a result of a failure to

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<sup>87</sup> See Michael Zakour and David F Gillespie. *COMMUNITY DISASTER VULNERABILITY: THEORY, RESEARCH, AND PRACTICE*. New York: Springer, 2013. I borrow theories and principles from sociology of disasters because of the multidisciplinary nature of the variables that give rise to disasters. A subjective understanding of vulnerability is necessary to keep up with the dynamic nature of disasters.

adapt (hence a liability).<sup>88</sup> Vulnerability for CCIM is the inability to cope in the face of an environmental hazard- but vulnerability is more than just the physical hazard itself. It goes into socioeconomic and political issues.<sup>89</sup> But sometimes CCIM might not even be available as an option to certain groups or people because of lack of resources. Due to these complications, how we view the movement therefore, informs the kind of policy or legal response we choose to adopt.

### **i. Why do People Move: Insight from Lee’s theory of Migration**

According to Lee’s model, migration is governed by a “push-pull” process. Whereas unfavorable conditions in one place “push” people out, favorable conditions in an external location “pull” them out.<sup>90</sup> The earliest migration theorist Ravenstein, understood the primary cause for migration to be better external economic opportunities. He also underlined that the volume of migration decreases as distance increases and migration occurs in stages instead of one long move. Population movements are bilateral and migration differentials (e.g. gender, social class, age) influence a person’s mobility. A simplistic rendition of this law applied to the context of CCIM, would be that unfavorable conditions (environmental degradation, natural disasters) push people out from their homes and better environmental conditions elsewhere pull them out. However, disaster theory tells us that it is not that simple. Establishing a causal link between migration of a certain person and an environmental

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<sup>88</sup> Koko Warner et al., *Climate Change and Migration : Reflections on Policy Needs*, MEA BULL. 1–4 (2009).

<sup>89</sup> S. L. Cutter, 20 VULNERABILITY TO ENVIRONMENTAL HAZARDS PROGRESS IN HUMAN GEOGRAPHY 529–539 (1996).

<sup>90</sup> See Royal Statistical Society, *The Laws of Migration Author ( s ): E . G . Ravenstein Source : Journal of the Royal Statistical Society , Vol . 52 , No . 2 ( Jun., 1889 ) , pp . 241-305 Published by : Blackwell Publishing for the Royal Statistical Society Stable URL : <http://www.jstor.org> , 52 241–305 (2010).; Waldo Tobler, *Migration: Ravenstein, Thornthwaite, and Beyond*, 16 URBAN GEOGR. 327–343 (2010).*

harm is a particularly hard task. In the case of sudden onset disasters, it might be easier to see the causal link between climate change and the disaster that is causing the persons to move than in the case of slow onset disasters where, the link is neither clear cut nor linear. In addition to that the “pull-push” approach assumes that there is equality among all affected people in terms of economic power, agency, mobility, social status, political power, etc.

## **ii. What is a Disaster?**

I turn to sociological disaster theories to better understand what constitutes a disaster causing human displacement and to provide a multidimensional approach to addressing it. The evolution of disaster theory over the past two centuries demonstrates its instrumentality in determining whether or not humans have an ethical responsibility or agency in the prevention of disasters, in providing protection from harm or in restitution in the aftermath of harm. It also informs how one is to prepare for risk.<sup>91</sup> Conceptions of disasters that assume the unavailability and naturalness of risk tend to avoid responsibility whereas the ones that conceive it from a social perspective tend to assume responsibility.<sup>92</sup>

Early 20<sup>th</sup> century disaster theories focused exclusively on the physical aspect of natural disasters- the physical being an “outside assault” on social systems “which can cause them to break down”<sup>93</sup> Dynes recounts that the first set of “disaster theories”- act of God and act of nature, especially, focused mostly on the physical aspect of the

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<sup>91</sup> Astrid Von Kotze, “A New Concept of Risk”, in *RISK, SUSTAINABLE DEVELOPMENT AND DISASTERS: SOUTHERN PERSPECTIVES*, A. Holloway ed., 39 (1999).

<sup>92</sup> *Id.*

<sup>93</sup> Enrico Quarantelli, *WHAT IS A DISASTER?: PERSPECTIVES ON THE QUESTION* 266 (1998).

disaster and the lack of human agency in the unfolding of disasters.<sup>94</sup>

Recent disaster theories emphasize on human agency and responsibility for disasters. It was Carr, who first proposed a social action view of disasters which says that a disaster is the result of the collapse of cultural protections.<sup>95</sup> Embedded in this view is the idea that the physical event in itself does not constitute the disaster but rather the outcome of the physical event when it interacts with human/ social forces.<sup>96</sup> The idea is that the physical event is just one component of the disaster and humans have the agency and responsibility to prevent disasters. Several other disaster theorists joined this camp that objected to the purely geophysical process oriented disaster theory.<sup>97</sup>

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<sup>94</sup> See Russel Dynes, *The Lisbon Earthquake in 1755: Contested Meanings in the First Modern Disaster* (1997). “Disaster as an act of God” ascribed the source of disaster to a supernatural being or source, which would make humans innocent victims who are not responsible because humans are unable to cause or prevent such an occurrence from happening. Geophysical or environmental harms occurred to show “disturbance between earthly and heavenly spheres”. Therefore, there is no human responsibility to prevent or adapt to disaster because we are limited beings who can do nothing in the face of a supernatural force- an act of God. According to Smith, this is “a fatalistic syndrome whereby individuals feel no personal responsibility for hazard response and wish to avoid expenditure on risk reduction.” See, Anthony Oliver-Smith, Anthropological research on hazards and disaster, *Annual Review of Anthropology* 70 (1996).

See also, Tierney, K., Lindell, M., & Perry, R. (2001). *Facing the unexpected: Disaster preparedness and response in the United States*, Joseph Henry Press 13 (2001). Over time, the “disaster as an act of God” theory gave way to “disaster as an act of nature”, which saw the disaster as a natural rather than supernatural occurrence. Dynes describes the Lisbon Earthquake as “a turning point”. Dynes argues that in the Lisbon Earthquake the state’s response to the disaster through reconstruction and rehabilitation required an opposition of the “traditional notions of supernatural causation” of disasters.

<sup>95</sup> Lowell Carr, “*Disasters and the Sequence-Pattern Concept of Social Change.*” *American Journal of Sociology*, Vol. 38, 207–218 (1932).

<sup>96</sup> Wolf Dombrowsky, AGAIN AND AGAIN. IS A DISASTER WHAT WE CALL A “DISASTER”? Quarantelli, E.L. (ed.), *WHAT IS A DISASTER? PERSPECTIVES ON THE QUESTION*, 19-30. (1998). Dombrowsky 1998, 24–25. See also, Gilbert (1998) 13, Therefore human agency signifies human responsibility at least for human actions that resulted in “collapse of [...] protections”

<sup>97</sup> KENNETH HEWITT, THE IDEA OF CALAMITY IN A TECHNOCRATIC AGE, in KENNETH HEWITT (ED.), *INTERPRETATIONS OF CALAMITY*, 3-32 (1983). Hewitt argued that disasters are not purely geophysical processes and that the human ability to cope is not always determined by the physical event. The ordinary, non-disaster contemporary and historical societal structures and processes have a bearing on the cause and effect of disasters.

The most contemporary view of disasters rejects purely technical approaches to disasters as inadequate and calls for a more subjective analysis of disasters, focusing on social justice, ethics and morality and an understanding of the conditions that make people vulnerable to physical hazards.<sup>98</sup>

### **iii. Vulnerabilities**

The decision to migrate and the ability to migrate and flee harm are functions of vulnerability which is only partly about the environment. The physical and social environments are both essential elements in determining vulnerability.<sup>99</sup> Therefore, reducing vulnerability is as much about the distribution of social opportunities and reducing inequality as it is about reducing greenhouse gas emissions. There have been many different views of vulnerability.<sup>100</sup> In the context of social disaster vulnerability theory it has been described as “the extent and severity of damage that is likely to occur to the functioning and well-being of individuals and social systems”.<sup>101</sup> Vulnerability has also been described as “the totality of relationships in a given social situation producing the formation of a condition that in combination together with

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<sup>98</sup> Tierney, Lindell and Perry refer to this as the “political-ecological perspective” at one point (p. 16), and as the “vulnerability perspective” at another (p. 23). Quarantelli describes this as a “postmodernist framework” that seeks to understand disasters subjectively based on the perspective of victims.

<sup>99</sup> Zakour, *supra* note 87.

<sup>100</sup> See Anthony Oliver-Smith and Gregory Button. (2005). “Forced Migration as an Index of Vulnerability in Hurricane Katrina” For the 6th Open Meeting of the Human Dimensions of Global Environmental Change Research Meeting-Expert Working Group on Vulnerability (Oct. 11-14, 2005) Etymology: The word vulnerable is derived from the Latin verb “Vulnerare” meaning to be wounded and therefore could denote the potential to be harmed. Oliver-Smith and Button describe vulnerability as “the ratio of risk to susceptibility. See Oliver-Smith and Button (2005).

<sup>101</sup> See B WISNER ET AL, AT RISK: NATURAL HAZARDS, PEOPLE’S VULNERABILITY AND DISASTERS (2ND EDITION). NEW YORK: ROUTLEDGE (2004). The physical environment subsumes the natural, built, and technological environments. The social includes the economic, political and cultural environments. Social environments are reflected in the values, norms, beliefs and other cultural characteristics governing a system.

environmental forces causes a disaster.”<sup>102</sup> In other words, vulnerability is the degree to which a system is susceptible to and unable to cope with adverse effects of climate change, including climate variability and extremes. It arises from social processes as well as environmental ones, whereby unequal consequences in the face of similar exposure to a natural hazard ensue from differences in capacities and abilities to handle the impact of a hazard.<sup>103</sup>

I refer to Zakour’s conception of vulnerability, because it is systematic and broad enough to incorporate other elements in the theoretical framework.<sup>104</sup> Zakour defines vulnerabilities as function of liabilities (negative factors) and capabilities (positive factors).<sup>105</sup> This is similar to McEntire’s conceptualization that disaster vulnerability has four components, i.e. susceptibility, risk, resilience and resistance.<sup>106</sup> Whereas susceptibility and risk fall under liabilities, resilience and resistance are determined by capabilities.<sup>107</sup>

Zakour says liabilities are “the root causes of vulnerabilities” and they include elements that exacerbate “the effects of stress, adversity or loss” or heighten the

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<sup>102</sup> Anthony Oliver-Smith, *Disasters and Forced Migration in the 21st Century*, <http://understandingkatrina.ssrc.org/Oliver-Smith/2006>.

<sup>103</sup> Kenneth Hewitt, Ed. *Interpretation of Calamity: From the Viewpoint of Human Ecology* (1983). Boston, Allen; Kenneth Hewitt. *Regions of Risk: A Geographical Introduction to Disasters*. Essex, Longman 143 (1997). Hewitt also argued that the geophysical or biophysical hazard studied alone does not give us a full picture because disasters are “defined by social processes and structures” as well.

<sup>104</sup> MICHAEL JOH ZAKOUR AND DAVID F GILLESPIE. *COMMUNITY DISASTER VULNERABILITY: THEORY, RESEARCH, AND PRACTICE*. NEW YORK: SPRINGER (2013).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* One can also think of it as the degree of exposure to the adverse impacts of climate change, the system’s sensitivity and the population’s adaptive capacity.

occurrence and ramifications of a disaster while at the same time delaying the “response and recovery process”.<sup>108</sup> He lists as examples of liabilities “limited access to political power, low levels of social and natural environments, aging and unprotected physical infrastructures, endemic disease, gender roles, endemic poverty, racism, a history of colonial exploitation, imbalances in trade and underdevelopment.”<sup>109</sup> These liabilities interplay with each other, amplifying vulnerabilities. For example, to emphasize the link between economic position and location, Hooke says, “the poor within each society are forced to live in substandard structures on more dangerous land, and have fewer resources to lessen their own risk and vulnerability.”<sup>110</sup> These elements increase susceptibility and risk. Other liabilities include lack of agency and exposure. Lack of agency refers to the inability of someone to switch livelihoods easily. Those whose livelihood depends heavily on the climate and who cannot easily switch to a different livelihood could be more sensitive to the change as it would be harder for them to adapt in the altered environment. Low education levels, poverty, lack of resources and infrastructure, etc., are all factors that aggravate the problems. Exposure refers to the extent to which a person/ community is in harm’s way. Although this is a matter of geography, more often than not, this is also a function of one’s economic or social position. For instance, someone living on the sea shore of a low lying island is more exposed to the impacts of cyclones, typhoons and hurricanes than someone living inland on a mountaintop. Someone’s residence influences the degree to which he/ she is exposed to the disaster.

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> William Hooke, "Progress and Challenges in Reducing Losses From Natural Disasters", at 283. Also available at, <http://www.grida.no/geo/GEO/Geo-2-331.htm> (last visited Jul. 14, 2016). NSTC/CENR Subcommittee for Natural Disaster Reduction, *Progress and Challenges in Reducing Losses from Natural Disasters*.

Zakour describes capabilities as assets or as a “form of capital”, that help resilience or resistance to hazards.<sup>111</sup> He gives as examples “political influence, economic assets and societal ideologies in support of the dignity and rights of people to enjoy a high quality of life, environmental capabilities reflecting aspects of the social, physical and natural environment which provide resources needed to mitigate, prepare for, respond to and recover from disaster.”<sup>112</sup> The IPCC’s definition of vulnerability to climate change has shifted from “[ ] the degree to which systems are susceptible to, and unable to cope with, adverse impacts of *climate change* including *climate variability* and extremes” to “the propensity or predisposition to be adversely affected”.<sup>113</sup> This could be seen as an inclusion of the various complex components of vulnerability.

Adaptive capacity is the ability of a person or a community to get out of harm's way or reduce susceptibility to damage. The capacity to adapt varies at the country, community and individual levels. In adaptation, states are not on par with each other; instead the level of development and the availability of resources for adaptation are all important aspects of adaptation. For example, Nicaragua and Netherlands in addition are not on par when it comes to the way that they would cope in the face of environmental disasters. They do not possess the same resources, level of development in early warning systems technology, or infrastructure, in addition to being impacted differently.

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<sup>111</sup> Zakour, *supra* note 104.

<sup>112</sup> *Id.*

<sup>113</sup> IPCC 2007 *Supra* note 45, at 883; IPCC 2012 at 32.

### 3. A Cosmopolitan Approach to Addressing Climate Change Induced Migration

*Climate Change has become a resourceful idea and a versatile explanation which can be molded and mobilized to fulfil a bewildering array of political, social and psychological functions. It is an idea as impressive, complex and slippery as democracy and an explanation as ubiquitous, alluring and inadequate as our genes.*<sup>114</sup>

Mike Hulme

In this section I discuss the ethical/ moral side of the debate. I use cosmopolitanism as a normative frame for how to conceptualize CCIM and cosmopolitan<sup>115</sup> accounts of justice to advocate a human rights-based approach to address it.

The account of cosmopolitan theory that I use does not seek to do away with the nation state or to establish a centralized cosmopolitan institution, but rather uses cosmopolitanism as a moral basis for response. The account of cosmopolitanism that I argue for recognizes the highly decentralized and fragmented nature of law pertaining to climate change, and recognizes the increasing role of non-state actors in authoring a large number of instruments that have a great impact on people's lives and livelihoods,

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<sup>114</sup> Mike Hulme, *Cosmopolitan Climates : Hybridity , Foresight and Meaning*, 1–10 (2009).

<sup>115</sup> In addition to the arbitrary and somewhat banal meanings ascribed to the term, as a concept in legal and political theory, cosmopolitanism has existed for millennia in Oriental and Western civilizations. In the Western world, its origin can be traced to ancient Greece and Rome. In the Christian thought “render unto Caesar what is Caesar’s and unto God what is God’s” Caesar’s realm of authority is within the patria, the earthly state and God’s is in the *Citta Dei* the city of God. Global brotherhood, citizenship with everyone in the world is possible because of this unifying factor. [Athena S. Leoussi, *Encyclopedia of Nationalism* 34 (2001)]

and in the formation and transformation of regimes over time. Indeed, environmental law especially is governed by a plethora of documents and instruments that are not necessarily legally binding in the traditional sense.<sup>116</sup> The interactions that give rise to the changes in law occur not only between traditional international actors but also nontraditional “cosmopolitan” actors.<sup>117</sup> This is compatible with Brunee and Toope’s interactionist account of international law.<sup>118</sup> I propose a cosmopolitan similar to Simon Caney’s rights-based cosmopolitanism to address CCIM.<sup>119</sup>

### **i. What is Cosmopolitanism?**

Although there is no one single unified theory of cosmopolitanism<sup>120</sup>, at the base of all cosmopolitan thinking is a normative ideal that says all human beings are members of “one single community which is governed by a universal and egalitarian law.”<sup>121</sup>

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<sup>116</sup> See chapters four and five below.

<sup>117</sup> I am referring to the complex networks of individual activists, NGOs, experts, academics, and NPOs that are working to bring CCIM to the agenda of international negotiations and working at low levels to introduce soft law instruments

<sup>118</sup> JUTTA BRUNNÉE, AND STEPHEN J TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010).

<sup>119</sup> See Simon Caney, *Climate Change, Human Rights, and Moral Thresholds*, CLIM. ETHICS ESSENT. READINGS (2010).; SIMON CANEY, *COSMOPOLITAN JUSTICE, RESPONSIBILITY, AND GLOBAL CLIMATE CHANGE*, 18 LEIDEN J. INT. LAW 747 (2005).

<sup>120</sup> See The Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/cosmopolitanism/> (last visited Mar. 26, 2016). The term “cosmopolitanism” originated from the Greek term “Kosmopolites” meaning “citizen of the world”. Historically the first person to claim being a citizen of the world, the Greek philosopher Diogenes saw it as denouncing one’s status in the polis. Modern cosmopolitanism is predicated on the notion that all human beings belong to the same community, regardless of their political or religious affiliations, hence attachment to fellow citizens of the state, the state and cultures can get in the way of cosmopolitan ideals. The Stanford Encyclopedia of philosophy recognizes four forms of cosmopolitanism, namely political, cultural, economic or moral, the idea being recognizing commonalities in these elements which would unite communities around the world.

<sup>121</sup> Roland H. M. Pierik & W. G. Werner eds, *COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY I* (2010).

Although there are several accounts of cosmopolitan thought, most emphasize on the moral worth of all humans, with individuals being the ultimate units of moral concern, as opposed to states or institutions.<sup>122</sup> For cosmopolitans, respect and consideration is not connected to one's nationality or affiliation in some other institution but just by virtue of one's humanity.<sup>123</sup> Arguably, a number of theoretical perspectives could fall within the ambit of this definition, because there can be several conceptualizations of equal treatment of all people. The normative implication of this common humanity is that we would have a moral duty towards every person regardless of their nationality or where they are in the world.<sup>124</sup> Thus, cosmopolitanism broadly conceived is about identity and moral responsibility, which Brock classifies into two, (1) identity and responsibility cosmopolitanism and (2) moral and institutional cosmopolitanism.<sup>125</sup> Identity cosmopolitanism is characterized by a multiplicity of cultures that a cosmopolite identifies with, and that membership in a particular culture is not essential for one's personal identity or living a flourishing life.<sup>126</sup> It entails a freedom therefore,

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<sup>122</sup> Gillian Brock, *Contemporary Cosmopolitanism: Some Current Issues*, Philosophy Compass 8/8, 689, 689-698 (2013). See Roland H. M. Pierik & W. G. Werner eds, COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY 1 (2010). In ancient times, the *cosmopolis* was seen as "a perfect order, guided by divine or natural reason" whereas the *polis* represented "failing ideals of justice and law".

<sup>123</sup> Pierik & Werner eds, *Supra* note 121 at 1.

<sup>124</sup> *Id.* Martha Nussbaum says cosmopolitans are, "persons whose primary allegiance is to the worldwide community of human beings." MARTHA NUSSBAUM, "PATRIOTISM AND COSMOPOLITANISM", IN FOR THE LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM, ed. Joshua Cohen 4 (1996). Cited in Roland H. M. Pierik & W. G. Werner eds, COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY 1 (2010).

<sup>125</sup> Gillian Brock, *Contemporary Cosmopolitanism: Some Current Issues*, Philosophy Compass 8/8, 689, 689-698 (2013). Opponents of cosmopolitan theories reject the idea of an "institutional cosmopolitanism" which they say can be an imperialist agenda in hiding.

<sup>126</sup> Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative', Michigan journal of Law Reform, Vol. 25 1—93 (1992), Cited in Gillian Brock, *Contemporary Cosmopolitanism: Some Current Issues*, Philosophy Compass 8/8, 690, 689-698 (2013). See also, Jeremy Waldron, I Introduction, *What is Cosmopolitan?\**, 8 227–243 (2000). Later Waldron amended his view by saying that a cosmopolitan does not signify that someone has to "wear a coat of many colors, a bit of this and a bit of that". One

to choose one's identity out of the various cultures existing in the world.<sup>127</sup> Moral and institutional cosmopolitanism on the other hand, maintains equality of treatment for each individual regardless of citizenship or nationality because each person has "global stature as the ultimate unit of moral concern."<sup>128</sup> Pogge developed a threefold theory for moral and institutional cosmopolitanism: individualism (individuals are the units of moral concern), universality (this applies to everyone notwithstanding nationality) and generality (this applies globally).<sup>129</sup>

One may ask, what is the appeal of cosmopolitanism? What does an idealistic account of justice have to do with CCIM? Climate change, Mike Hulme says, dissolves the nature-culture, the present-future, and the global-local divide, and cosmopolitanism helps explain the dynamically changing political, sociological and psychological attributes.<sup>130</sup> Indeed, climate change continues to present a challenge not only to our ecosystem but also to our mainstream normative political and legal theories.<sup>131</sup>

I argue that climate change creates interconnectedness of humanity across temporal and spatial dimensions and this underlies the need for a cosmopolitan conception of climate change law and policy. I will examine the economic, political, cultural,

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can be as cosmopolitan by being in one place- nowadays because of globalization; people are exposed to a diversity of cultures, human practices and experiences."

<sup>127</sup> Gillian Brock, *Contemporary Cosmopolitanism: Some Current Issues*, Philosophy Compass 8/8, 689, 689-698 (2013).

<sup>128</sup> *Id.*

<sup>129</sup> Thomas Pogge, 48 (1992) cited in, Gillian Brock, *Contemporary Cosmopolitanism: Some Current Issues*, Philosophy Compass 8/8, 690, 689-698 (2013).

<sup>130</sup> Mike Hulme, *Cosmopolitan Climates, Hybridity, Foresight and Meaning*, Theory, 27 Culture and Society 268, 268 (2010).

<sup>131</sup> See Steve Vanderheiden, POLITICAL THEORY AND GLOBAL CLIMATE CHANGE 67 (2008).

environmental, and moral dimensions of this interconnectedness below.

First, the environmental component has to do with the transgenerational and transboundary causation and physical consequences of some environmental harms. For one thing, the gradual change in the earth's climate was not caused by the present generation alone, but rather by the aggregate impact of emissions of past generations in addition to emissions caused by present generations. For another, the effects of a change in one climate system can easily affect another system in another place. Acid rain that was occurring in Sweden in the early 1990s provides a good example of the problems associated with environmental harms whose impact is transboundary. Even though Sweden had reduced its Sulphur emissions<sup>132</sup> by 70 percent for over a decade, its Northern coniferous forests were experiencing acid rain which was destroying them.<sup>133</sup> It was discovered that only an eighth of the Sulphur deposits were "Swedish" Sulphur and the acid rain was due to pollution from Germany, Sweden, Poland, the UK, the Baltic States, Russia, Denmark and Czechoslovakia.<sup>134</sup> Global warming, emissions since the industrial revolution in the global North affects ecosystems in other places. Melting of the Arctic ice sheets contributes to sea level rise which in turn affects the viability of low lying coastal areas and small island developing states.

It is almost impossible to escape talking about climate change at major policy negotiations. In addition, because of the growing awareness of the reality of climate change and its impacts, climate change has allowed people to connect around it. All

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<sup>132</sup> Sulphur is a major cause of acid rain. See Christina Jutterstrm, Swedish forests threatened by acid rain, available at <https://www.greenleft.org.au/node/4728>. (Last visited Mar. 26, 2016).

<sup>133</sup> Christina Jutterstrm, Swedish forests threatened by acid rain (February 3, 1993), <https://www.greenleft.org.au/node/4728> (last visited Mar. 26, 2016).

<sup>134</sup> *Id.*

over the world, one can find networks of national, international and transnational actors actively engaged in activism around mitigation or adaptation to climate change. There are many activist groups that are trying to bring to light the existential threat that it is posing to small islands. In a way, climate change is not a defining issue at the macro level only but at the grassroots, micro level as well. It has changed and unified global culture around it.

Each individual state, community, person has a moral responsibility to respond to this but does this also translate to legal responsibility? This is the question that this section tries to tackle.

When we turn to the ethical side of the discussion, an important question is whether or not as a matter of ethics or morality we owe any duties towards people who are members of a polity different than ours, i.e. whether or not countries have an obligation to accept migrants, and more specifically CCIM and what kind of treatment the host state is supposed to provide them with. Cosmopolitans say yes, there is such a duty. I argue that the nature of climate change (anthropogenic causes, trans-boundary effects) urges us to entertain the idea that we are all citizens of the world and to address it as one unified community and that climate change migrants are all part of one community- the global community that is combating the ramifications of climate change.

Gillian Brock makes a very useful categorization of different accounts of cosmopolitanism and cosmopolitan justice.<sup>135</sup> The following are Brock's broad categorizations of cosmopolitan theories and theorists: Aristotelian or contractarian

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<sup>135</sup> See Brock, *Supra* note 122.

cosmopolitanism (Beitz, Pogge, Moellendorf, Brock);<sup>136</sup> cosmopolitanism conceptualized along Kantian lines (O'Neill)<sup>137</sup> capabilities-based cosmopolitanism (Nussbaum)<sup>138</sup>; rights-based cosmopolitanism (Shue, Caney, Beitz, Pogge);<sup>139</sup> utilitarian (Singer, Beitz, Pogge);<sup>140</sup> a combination of more than one approach (Pogge, Beitz).<sup>141</sup>

I will focus on the rights-based, contrarian and capabilities based accounts of cosmopolitanism for my analysis in the next section and I will argue how they provide a better avenue for response than other approaches, including reparative and utilitarian conceptions of justice and law.

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<sup>136</sup> CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979); THOMAS POGGE, *REALIZING RAWLS* (1989); DARREL MOELLENDORF, *COSMOPOLITAN JUSTICE* (2002); GILLIAN BROCK, *GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT* (2009).

<sup>137</sup> See Onora O'Neill, *Bounded and Cosmopolitan Justice*, *Review of Int'l Studies*, 26, 45-60 (2000).

<sup>138</sup> See Martha C. Nussbaum, *Women and Human Development* (Cambridge University Press, 2000); See also Martha Nussbaum, *Poverty and Human Functioning: Capabilities as Fundamental Entitlements* (Chapter 3) in DAVID B. GRUSKY, S. M. RAVI KANBUR, AMARTYA SEN, *POVERTY AND INEQUALITY* (2006).

<sup>139</sup> See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY* (1980); JONES, 1999; THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2008); and CHARLES BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009); SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY*, (2005).

<sup>140</sup> See PETER SINGER, *FAMINE, AFFLUENCE, AND MORALITY* (1972); POGGE, *REALIZING RAWLS* (1989); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2008); AND CHARLES BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009).

<sup>141</sup> See THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2008); and CHARLES BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009).

## ii. Justice for CCIM

Katrina Wyman says that one of the challenges in addressing CCIM in general and in advocating for a new legal instrument for climate change migrants is finding a theoretical basis for it, e.g. a normative theory that would justify a duty to assist this category of migrants/ displaced persons over people who experience other types of hardship.<sup>142</sup> In this section, I briefly analyze and compare four accounts of justice: corrective, distributive, and cosmopolitan to advance the argument that a cosmopolitan approach is the normative account that best fits CCIM and discuss why the other theories provide an incomplete account of CCIM.

### a. Corrective Justice: “The Polluter Pays Principle”

In private law (in the law of torts), Aristotelian corrective justice is “the idea that liability rectifies the injustice inflicted by one person on another.”<sup>143</sup> The concept of responsibility in environmental law that best embodies corrective justice is the “polluter pays principle”.<sup>144</sup> This is the idea that, “whoever is responsible for damage to the environment should bear the costs associated with it.”<sup>145</sup> In other words, those

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<sup>142</sup> Katrina Miriam Wyman, *Response to Climate Migration*, 37 HARVARD ENVIRON. LAW REV. 167–216, 192 (2013).

<sup>143</sup> Ernest J. Weinrib, *Corrective Justice in a Nutshell*, The University of Toronto Law Journal, Vol. 52, No. 4 349, 349-356 (Autumn, 2002). Available at [http://www.jstor.org/stable/825933?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/825933?seq=1#page_scan_tab_contents) (Last visited Mar. 27, 2016). From Aristotle’s *Nicomachean ethics*, Book V. *See also*, Eric a Posner & Cass R Sunstein, *Climate Change Justice*, 354 (2007). Eric Posner and Cass Sunstein point out the difficulties associated with using corrective justice as a ground for mitigation efforts. Historically, the US has been the biggest emitter of GHGs (nearly 30%) the US has contributed a disproportionate share of the stock of GHGs.

<sup>144</sup> United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 16 (1982). Available at [http://www.unesco.org/education/nfsunesco/pdf/RIO\\_E.PDF](http://www.unesco.org/education/nfsunesco/pdf/RIO_E.PDF) (last visited Jul. 14, 2016)

<sup>145</sup> Taking Action, the United Nations Environmental Program. *See also*, THE POLLUTER-PAYS PRINCIPLE OECD Analyses and Recommendations (OCDE/GD(92)81), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(92\)81&docLangu](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLangu)

who did the harm should pay. I argue that the polluter pays principle provides an incomplete picture of CCIM for the following reasons.

First, corrective justice is premised on an action or omission that gave rise to harm, and we need to trace that particular action or omission. In this sense, corrective justice is retroactive, it focuses on past behavior. In order to determine this, one needs to be able to trace that action. This however is virtually impossible because of the intertemporal and interspatial dimensions of climate change. As we have seen earlier, climate change is the result of a complex interaction between natural processes and anthropogenic GHGs over long periods of time. Posner and Sunstein maintain that it is difficult to establish link between emissions and environmental impacts<sup>146</sup> and establishing causation in the case of CCIM is even harder, because it would be necessary to trace the harm (displacement) to an environmental event and establish a causal link between climate change and the environmental event that gave rise to the harm.<sup>147</sup> However, migration usually tends to be the final step in the causal chain. This is an almost impossible task, since there can be multiple causes for vulnerabilities. As discussed in section 2 of this chapter an environmental event is rarely the only reason that people move. Rather, migration is multi-causal. It is not just one event that gives rise to movement but rather the interactions of different stressors that combine,

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age=En (last visited Mar. 27, 2016). The Polluter Pays Principle has been incorporated in a number of international environmental legal instruments. For e.g. on April 21 2004 EU and council of ministers passed a directive affirming the polluter pays principle. The IPCC has mentioned in its reports that the polluter pays principle is a basis for responsibility. With climate change, this is tricky because of historical accountability. Henry Shue emphasizes on global environment and international inequality and says that the people who caused the pollution should pay.

<sup>146</sup> Eric A. Posner & Cass R Sunstein, *Climate Change Justice*, 354 (2007). Cited in Wyman, *supra* note 142.

<sup>147</sup> *See Id.* Posner and Sunstein criticize the use of corrective justice to ground mitigation efforts; and Wyman says this applies by extension to climate change migration, which we can think of as an adaptation measure or a failure to adapt.

sometimes compelling someone to move. Additionally, models cannot show us the proportion of GHG emission that each country contributed. Once emitted, GHGs combine in the atmosphere uniformly, which would make apportioning liability a very difficult task.<sup>148</sup>

Second, we need to establish the wrongfulness of the action- meaning, the emission of GHGs must have been considered a wrongdoing at the time of the emission.<sup>149</sup>

However, historically emission of GHGs was not treated as wrongdoing; therefore, it would be hard to apply the polluter pays principle to historic emissions that have intergenerational consequences.

Third, establishing a wrongdoing requires tracing the action to a wrongdoer - a polluter- an entity or person who can be held liable. This begs the question, who are the wrongdoers that caused anthropogenic climate change? Is it all of humanity, the developed world, past generations, present generations? Are the responsible parties alive or dead? The question of who is the polluter is also an attempt to find out at what level to impute liability- at the individual, community, or country level? Should corporations and private individuals be held responsible? The question here is whether we should think of individuals as the responsible parties because they have contributed to global warming as they make use of items that can cause release of greenhouse gases into the atmosphere or whether economic corporations that contribute to emissions should be responsible. Another possibility is to hold states responsible because they have bad regulatory policies that contributed to high concentrations of GHGs in the atmosphere or international regimes and institutions that are acting as

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<sup>148</sup> *Id.* at 193.

<sup>149</sup> See Eric a Posner & Cass R Sunstein, *Climate Change Justice* 354 (2007).

supra states. While Shue says countries should be responsible, Posner and Sunstein disagree.<sup>150</sup>

Simon Caney provides an analysis of different possibilities for how to conceptualize the wrongdoing, i.e. he asks whether “the action is individual and collective, direct and indirect and the polluters are individuals, economic corporations, maybe states, and companies that consume a lot of fossil fuels or engage in other activities that cause pollution”<sup>151</sup> One could also see it from the perspective of who can take action to prevent pollution. Henry Shue looks at this from an individualistic position and argues that it is just to make the present generation pay for the actions of past generations because the past generations are in some way related with the present generation, therefore they can be held liable for the actions of their ancestors.<sup>152</sup> I agree that the most feasible option is to ascribe responsibility to states. The governments can then distribute the costs of the responsibility domestically as well, through the imposition of taxes and other duties on certain activities that contribute to global climate change.<sup>153</sup>

Shue proposed a reverse version of the polluter pays principle- beneficiary pays principle<sup>154</sup>- which asserts that since the present generation benefits from the pollution

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<sup>150</sup> Caney, *supra* note 119. Citing Henry Shue, *Global Environmental and International Inequality*, (1999) *International affairs*, 533-7, at 534.

<sup>151</sup> *Id.* at 536.

<sup>152</sup> *Id.*

<sup>153</sup> In addition, one could argue that governments are responsible because they are in a position to amend the behavior of citizens through law e.g. by imposition of taxes.

<sup>154</sup> Caney, *supra* note 119. Shue’s focus is on the responsibility aspect rather than the punishment aspect.

caused by the past generations and since the future generation will reap the benefits of the actions of this generation; instead of looking at it from the perspective of harm caused, he proposes a “beneficiary pays principle.” The idea is that those who benefited, whose lives are better because of the activities that produced GHGs should pay those who are worse off because of the effects thereof.<sup>155</sup> Their standard of living is higher as a result, thus they must pay a cost for that.<sup>156</sup>

In addition to the intergenerational conundrum, Caney says that the perspective of the duty bearer needs to be taken into account and he points out that a corrective justice paradigm does not account for the particular circumstances of the polluter, such as ignorance or poverty.<sup>157</sup> Caney’s perspective of rights holders and duty bearers is that “we don’t ask too much of them and that the poor should not have to pay.”<sup>158</sup> The dilemma is in imputing liability to some entity that has no knowledge that the emissions were wrong and if the entity is unable to pay because of poverty. How can you hold someone responsible? Beyond a certain year, some argue that the polluter should have been aware of the consequences of GHG emissions. There is no excuse because there is an assumption of knowledge beyond that point. Some proposals for how to impute liability to historic emissions have been to just see the amount of emissions since a certain date. For e.g. Peter Singer uses the year 1990 as the cutoff year.<sup>159</sup> Although there is merit in using the polluter pays principle, Caney argues, it

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 537.

<sup>157</sup> *See Id.* at 761.

<sup>158</sup> *See Id.* at 762.

<sup>159</sup> *Id.*

requires a “background theory of justice - an account of persons’ entitlements” in order to be meaningful.<sup>160</sup>

Another problem relates to the difficulties of determining percentage of the liability to allocate to each collective or individual within the same generation.<sup>161</sup> Wyman suggests recognizing that GHGs are not the sole cause of the impacts, but can be “substantial cause” or applying a “theory of market share or a theory of joint and several liability.”<sup>162</sup> Wyman points out the danger in “relaxing the causal requirement for corrective justice to the point where it is no longer possible to be confident that we are requiring developed countries to make payments because of actions they undertook, which is the basis of corrective justice.”<sup>163</sup> This is still difficult to do however, as states are not ready to accept this type of responsibility.<sup>164</sup>

Independent reliance on polluter pays principle as a final standard of greenhouse equity could be tantamount to undue recrimination in the quest for justice. Therefore, ascribing responsibility on the basis of corrective justice is problematic for CCIM

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<sup>160</sup> *Id.* at 765. Corrective justice rests on the idea that payment is due when persons have “exceeded their entitlement”, i.e. when they have exceeded their quota of permissible emissions.

<sup>161</sup> Wyman points out the difficulty in apportioning the liability share because GHGs mix uniformly. *See* Wyman, *supra* note 142, at 193.

<sup>162</sup> *Id.* at 194.

<sup>163</sup> *Id.*

<sup>164</sup> *See e.g.*, Inuit Petition Inter-American Commission On Human Rights To Oppose Climate Change Caused By The United States Of America (Dec. 7, 2005), <http://www.inuitcircumpolar.com/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america.html> (last visited Mar. 28, 2016). The Inter-American Commission for Human Rights rejected the petition and did not accept that the US had joint and several liabilities in this case. This case is discussed in more detail in chapter 4 under the climate change regime.

because establishing a causal link between migration of a certain person and climate change is very complex. Although there is no doubt that the displacement or migration is an infringement on people's fundamental rights, it would be hard to point to a specific source of the harm and to quantify the percentage of liability, etc. In the case of sudden onset disasters, it might be easier to see the causal link of the event with climate change. With slow onset disasters however, the link is not always straight forward. As we have seen in the earlier section, migration is a function of several factors that cause vulnerability. Sometimes, it is easy to see the environmental harm triggered by climate change. However, at other times; climate change could be one of several other factors, including economic, political or social that cause one to migrate. Environmental degradation could add to an already existing stress on a community affecting the decision to migrate.

**b. Distributive Justice: a vision of an equitable global**

Wyman (2011) and Caney (2005) have explored the possibility of establishing responsibility through a conception of climate change justice by using equitable distribution as a moral basis.<sup>165</sup> Distributive justice maintains that income should be redistributed among the members of a community, citizens equitably. The rationale for distributive justice is the correction of the gap that exists between the haves and have-nots, in the national context. It is not clear how this would translate globally, but the basic idea would be to close the wealth disparities between the developing world and the developed world.

The IPCC has underscored that certain communities are more disproportionately affected than others. Most of these communities are in either developing or

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<sup>165</sup> See Wyman, *Supra* note 142 and Caney, *Supra* note 119.

underdeveloped countries (for instance many parts of Africa and small island developing states) and do not have the requisite infrastructure to respond to the impending havoc of climate change migration.

Richard Miller argues that reliance on considerations of poverty creates unmerited ascriptions of poverty.<sup>166</sup> He puts forward the idea that people in developed countries have unmet responsibilities to help people in developing or underdeveloped countries—the global poor.<sup>167</sup> Richard Miller argues that if those that are affected are poor then the richer countries have a duty towards the communities that are worse off as a result of climate change. For Richard Miller the reason why this type of duty is imposed is not because the richer countries contributed to the causation of the harm but rather because they have a moral obligation to help those that are less fortunate than them. In addition to that the obligation stems from the fact that developed states “benefited from exploiting developing and underdeveloped states.” In economic interactions, people in developed countries take advantage of people in developing countries because of the latter's the weak bargaining position. Moreover, they one can argue that they have been negligent with respect to climate harms. Rich countries have benefited from the activities that gave rise to climate change. However, the past polluters may not have been aware of the possible ramifications of their actions for climate change.<sup>168</sup>

This responsibility is not a duty of kindness towards the needy but rather a duty to

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<sup>166</sup> RICHARD MILLER, *GLOBALIZING JUSTICE*, 95 (2010).

<sup>167</sup> *Id.*.

<sup>168</sup> *See Id.*

avoid taking advantage of people in developing countries.<sup>169</sup> He believes that power in global interactions is abused in the contemporary world: international or transnational manufacturing, deliberations setting in and institutional framework for world trade and finance.<sup>170</sup> Efforts to contain global greenhouse gas emissions and to adapt to climate change also fall within this ambit.

Distributive justice has been used by environmental activists to advocate environmental justice. Environmental injustice occurs when environmental burdens and benefits are not shared equitably among communities. For instance there are several studies showing that certain members of a community bear a bigger share in environmental burdens- people who are already marginalized, minority groups, people of color, and poor people. Climate change burdens are the costs of adaptation and mitigation. One could argue that impacts of climate are also not shared equitably among nations and communities, some bear bigger burdens than others, which could justify an arrangement for redistribution of burdens and benefits.<sup>171</sup> Distributive justice could be a means of either ensuring global socioeconomic justice or ensuring global climate justice- reducing the gap between environmental benefits and vulnerabilities experienced across countries.

As discussed in the previous section on vulnerability, vulnerabilities to climate change are only partly environmental- socioeconomic reasons also factor into the equation of

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<sup>169</sup> *Id.*

<sup>170</sup> *See Id.*

<sup>171</sup> SIMON CANEY, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, 18 LEIDEN J. INT. LAW 749, 747 (2005). For e.g. Aid, monetary transfers, etc. could be used to help the developing world with the cost of mitigation/ adaptation, including the costs of CCIM.

CCIM. For this reason, one could argue that distributive justice paints a clearer picture of CCIM. However, on its own it does not provide a complete picture.

As discussed by Caney, it would be difficult to establish environmental responsibilities divorced from an understanding of persons' economic rights and duties.<sup>172</sup> For Caney environmental justice and economic justice are intricately interwoven.<sup>173</sup> Therefore, says Caney, "an adequate theory of justice in relation to climate change must explain in what ways global climate change affects persons' entitlements."<sup>174</sup> Because climate vulnerability is not just related to national wealth but also to many other factors, this approach would be difficult to apply.<sup>175</sup>

In international environmental law, the principle of common but differentiated responsibilities embodies this ideal of distributive justice: that communities and countries have a common responsibility but the way that the responsibility is shared is proportional to a country's historic responsibility and the ability to adapt to and mitigate the effects of climate change.<sup>176</sup> The UNFCCC is predicated on this notion; it calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 752.

<sup>176</sup> See United Nations Framework Convention on Climate Change, art 3(1) and Preamble, Dec. 18, 2009, FCCC/CP/2009/L.7. available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited Jul. 14, 2016).

conditions.<sup>177</sup> The idea is that developed countries should have a bigger share of the responsibility for climate change, bearing in mind that they have not only benefited from the emissions that gave rise to climate change in the first place, but that they also have better infrastructure and financial ability to undertake effective adaptation and mitigation efforts. In spite of this they continue to pollute more.

One can also think of an intergenerational distribution of the benefits and burdens of climate change. The agreed upon ethical standards of behavior, Alan Atkisson argues, can be in the form of simple principle, such as “the Golden Rule”, i.e. do not do something to someone else that you would not like to have done to you.<sup>178</sup> This principle, seemingly simple, captures elements of both intergenerational and intra-generational justice- that our actions should ensure that other communities are not worse off than we are and we should not leave the world in a worse state for future generations.

I argue that there is no one conception of climate change justice that can inspire a panacea of a response, but rather a holistic combination of several. I believe that distributive justice can give guidance but it is not a complete account for the above mentioned reasons. Therefore a theory of justice that addresses global climate change should draw on distributive justice, under an umbrella cosmopolitan moral frame.

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<sup>177</sup> *Id.*

<sup>178</sup> Alan Atkisson, Global Warming is an Ethical Issue,

<http://www.earthcharterinaction.org/invent/images/uploads/Global%20Warming%20is%20an%20Ethical%20Issue%20by%20Alan%20AtKisson.pdf>, (last visited May 1, 2015).

### iii. **Cosmopolitan Justice for CCIM: A Rights Based Approach**

In this section I argue that Caney's rights-based cosmopolitan approach to addressing climate change is also beneficial for conceptualizing and addressing CCIM. Given that there is a common resource that is at stake and a common problem that is at the root of disasters that are threatening the lives of those who are forced to migrate because of climate change; I take a cosmopolitan approach which places individuals at the center in contrast to a statist one which emphasizes state membership.<sup>179</sup> I subscribe to a humanist paradigm of cosmopolitanism which says that our duties of justice are based on our shared humanity, i.e. our common challenge- climate change- in contrast to a relational paradigm which says duties of justice are based on co-membership in an association.

I argue that a holistic "cosmopolitan justice" should incorporate elements of environmental justice, i.e. considerations of intergenerational and intra-generational equity.<sup>180</sup> Moreover, I argue that it could benefit from domestic theories of distributive justice and Nussbaum and Sen's capabilities approach.

I take a rights-based as opposed to a utilitarian approach. The benefit of working within the human rights framework (as opposed to the climate change law framework) has to do with the way that these regimes work: the climate change regime regulates horizontal state-state relations while the human rights paradigm allows for vertical private action by citizens of states parties to conventions.<sup>181</sup> The other reasons for

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<sup>179</sup> See DARREL MOLLENDORF, *GLOBAL INEQUALITY MATTERS* (2009).

<sup>180</sup> Simon Caney, *Cosmopolitan Justice, Responsibility and Global Climate Change*, 18 *Leiden Journal of International Law* 747, 749 (2005).

using a human rights approach, as per Caney are that there is ample evidence that climate change puts rights at stake and that a human rights centered analysis of climate change can have “far reaching consequences for understanding the kind of action that should be taken.”<sup>182</sup>

The central idea of cosmopolitan thought is that there is an element uniting humanity. The loss of biosphere somewhere is a loss to humanity in general.<sup>183</sup> Notions of intergenerational and intra-generational equity imply that we are fellow citizens not only with the people of the current generation living in other areas of the world, but also with past and future generations. Much as we inherited the biosphere, we inherited climate from past generations, and we owe a duty to preserve it for future generations as well. Hence, our world citizenship for CCIM purposes is two-fold with a temporal and a spatial dimension. This cosmopolitan thought is predicated on the fact that we have common interests on the global environment as do our fellow citizens of earth.

An interesting justification for allowing people from small island developing states to relocate was proposed by Mathias Risse.<sup>184</sup> His justification is inspired by Hugo Grotius’s idea that “God gave the earth to mankind in common” and private property

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<sup>182</sup> *Id.* Caney’s conception of rights is based on H.L.A. Hart’s seminal work on the source of our rights being our humanity and not our affiliation with any particular group or state.

<sup>183</sup> Andreas Philippopoulos-mihalopoulos, *Actors or Spectators? Vulnerability and Critical Environmental*, 3 OÑATI SOCIO-LEGAL SER. 854–876 (2013). Burns H. Weston & Tracy Bach, *Recalibrating the Law of Humans with the Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice and*, VERMONT LAW SCH. RES. PAP. (2009). For instance, certain areas of the world, such as the Amazon Basin are considered as natural heritage of mankind. Their loss is a loss to all inhabitants of the earth. The environment is an element that unites us all, we ought to be cosmopolitans with regard to the element that unites us. In so far as the effects are trans-boundary our response should also be cosmopolitan.

<sup>184</sup> Mathias Risse, *The Grounds of Justice: An Inquiry about the State in Global Perspective*, PERSPECTIVE 1–678 (2010).

as a right of necessity, which would mean that people have a fundamental right of self-preservation and therefore should be allowed to relocate in order to preserve their lives because these rights of survival supersede the right of other states to ban them from entering their land.<sup>185</sup> Along the same lines, Risse says that the earth is given by “a divine grant”, i.e. it belongs to all of humanity; although we did not produce the resources coming from the earth we need them for survival.<sup>186</sup>

According to Thomas Pogge, three elements unify all cosmopolitan thought: “individualism: all individuals should be treated in their individuality, as separate from a group and they receive rights, privileges, protection and have duties as individuals; universality- cosmopolitan law is universal. It is the same everywhere in terms of prescription, legislation, enforcement and adjudication; and generality: there are general principles of cosmopolitanism.<sup>187</sup> All persons stand in certain moral relations to one another. All persons have equivalent legal rights and duties- that is to say they are fellow citizens of a universal republic.”<sup>188</sup>

#### **a. A Cosmopolitan conception of Rights**

The cosmopolitan approach takes a moral theory position on human rights. Caney’s cosmopolitan vision of human rights submits that human rights are grounded in persons’ humanity; they represent moral thresholds- minimum standards below which

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 283.

<sup>187</sup> *Thomas W Pogge, Cosmopolitanism and Sovereignty, University of Chicago*, available at, <http://www.jstor.org/stable/2381495>, (Last visited Aug. 3, 2015).

<sup>188</sup> *Id.*

people should not fall; they respect each and every individual; and they take general priority over other values.<sup>189</sup> The Universal Declaration on Human Rights embodies this principle, “all humans are born free and equal.”<sup>190</sup>

Caney uses Thomas Nagel’s double-pronged justification for human rights- intrinsic and instrumental. Whereas the intrinsic deontological justification says human rights are inviolable predicated on the idea of respect for all persons, the teleological instrumental justification maintains that human rights can be a means to an end.<sup>191</sup> The instrumental justification focuses on how human rights affect people’s lives in practical terms.<sup>192</sup> For Martha Nussbaum, human rights are valuable in so far as they “protect valuable capabilities which are necessary to lead a decent life.” Joseph Raz’s theory of rights is also instrumental and suggests that “rights protect interests that we prize so greatly, that are weighty enough to generate obligations on others.”<sup>193</sup>

For instance, in the case of the I-Kiribati, their way of life is necessary to lead a decent life and is at stake because of climate change. The I-Kiribati have a strong attachment to their land.<sup>194</sup> Their traditional construct of the land-man relationship is very spiritual

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<sup>189</sup> Simon Caney, *Climate Change, Human Rights and Moral Thresholds*, at 164-165, [https://www.humphreyfellowship.org/system/files/Caney\\_Climate\\_Change\\_Human\\_Rights%20\\_Moral\\_Thresholds.pdf](https://www.humphreyfellowship.org/system/files/Caney_Climate_Change_Human_Rights%20_Moral_Thresholds.pdf) (last visited Jul. 14, 2016).

<sup>190</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). art. 1, available at [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) (last visited Jul. 14, 2016). “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

<sup>191</sup> The intrinsic justification is Kantian in the sense that it treats persons as ends in and of themselves.

<sup>192</sup> *Id.* 165

<sup>193</sup> Joseph Raz, *The Morality of Freedom* at 60 cited on, SIMON CANEY, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, 18 LEIDEN J. INT. LAW 747, 767 (2005).

<sup>194</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

and fundamental to their identity. Ancestors who are buried in the land “watch over” the people. Sea level rise and shoreline erosion are making it harder for people to live there anymore, and little by little, as they move inland and eventually when the time comes for them to completely abandon their island, this spiritual connection is lost. CCIM threatens their way of being as much as it affects their access to essentials.

But Raz argues that rights-based moralities do not provide adequate foundation for an acceptable humanistic morality because rights are the grounds for duties and nothing more.<sup>195</sup> I would argue that these rights not only impose legal duties but also humanistic morals.

A moral defense of rights mandates that everyone has the right not to suffer from the disadvantages generated by global climate change. For example, a fisherman living on the coast of Tuvalu has the right to not suffer from the impacts of climate change. When we turn to the question of who bears the burden, who has the duty to respect the right not to suffer? Caney submits everyone has a duty not to emit GHGs in excess of their quota, and those who exceed have a duty to compensate others through mitigation or adaptation but this would be based on an “ability to pay principle” rather than a liability basis.<sup>196</sup> Although I agree with the above mentioned instrumental and intrinsic justifications for human rights for CCIM, I also submit that vulnerability is also at the center of our need to have rights protected.

#### **b. Individual rights v. collective rights**

Given that identifying the protected group is crucial to determining their rights and

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<sup>195</sup> Joseph Raz, RIGHT BASED MORALITIES, (Jeremy Waldron ed., THEORIES OF RIGHTS) 183 (1984).

<sup>196</sup> *Id.* at 769. This is illustrated with Peter Singer’s metaphor of the drowning child.

providing a legal solution, I look into the value of adopting a model that values community rights in addition to or instead of individual rights. This might be especially helpful in certain areas of the world. For instance in the context of certain African communities where there is more emphasis on the community, a collectivist approach might work better.<sup>197</sup> Moreover, I hope to show that granting community rights will minimize the difficulties associated with establishing causation, i.e. finding a causal connection between the migration and climate change.

Are the subjects of the rights individuals or collective entities? The individualistic approach has been criticized for being engrained in the liberal tradition which is essentially Western and does not take into account the socio-political and cultural particularities of certain communities.<sup>198</sup> Adamian also asserts that the liberal tradition does not favor the recognition of collective rights.<sup>199</sup> This argument is unsound in the context of the modern state, which is a multicultural state. Indeed as Will Kymlicka asserts in “Multicultural Citizenship” the modern state is ethnically and racially diverse and various groups that exist within a society are interconnected.<sup>200</sup> Based on a socio-political analysis, he counters the arguments that liberal legal theory is solely individualistic and that recognizing special group rights is undemocratic.<sup>201</sup> The argument against group rights is that it would involve differing treatment of different

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<sup>197</sup> Marin Adamian, ENVIRONMENTAL [IN]JUSTICE IN CLIMATE CHANGE, chapter in STEVE VANDERHEIDEN ED., POLITICAL THEORY AND GLOBAL CLIMATE CHANGE 73 (2008).

<sup>198</sup> *Id.* at 75.

<sup>199</sup> *Id.*

<sup>200</sup> WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS, 10 (1995).

<sup>201</sup> *Id.* at 107.

groups and is not in line with liberal political thought. However, group rights might actually be essential to the attainment of democracy, freedom and equality. In addition, it may help minorities (especially immigrants to a new country) to integrate better in the larger society.

Turning to the determination of what those group rights should incorporate; Kymlicka's classification of two sets of protections, internal and external<sup>202</sup> is a good starting framework. Internally, these communities threatened by displacement would have an internal forum where they can come together, discuss and determine their interests which they would like protected. Externally, they would have a platform to voice their interests and get the same treatment as other groups. Hence, justice is two-pronged, the recognition of the group's autonomy to some extent and the grant of equal rights as other groups in the state.

I argue that group rights are more effective in protecting the rights of people threatened by CCIM for the following reasons. It is easier to establish the causal link between migration and climate change when dealing with communities as opposed to individuals. It will ensure the greatest participation. Individuals in the community can come together and decide the values they wish to get protected. This is especially important in the context of CCIM as, for some communities moving will mean giving up many valuable artifacts and even their way of life.

Kymlicka justifies the need for group rights by saying different treatment of different groups is essential for real equality.<sup>203</sup> This is also in line with Brian Barry's

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<sup>202</sup> Kymlicka states that while internal restrictions are meant to prevent destabilization because of discord among the members, the external protections are meant to protect the group against the impact of majority external decisions.

<sup>203</sup> *Id.* at 108.

conception of justice as equal rights.<sup>204</sup> Kymlicka asserts that national minority rights may not greatly increase diversity within the majority culture, and could even reduce diversity.<sup>205</sup> Kymlicka argues that most such rights are based upon the idea that justice between groups requires that the members of different groups be accorded different rights.<sup>206</sup>

Hence, I argue that group differentiated citizenship is needed for the purpose of justice between the members of different groups. The needs of migrants that have left their homes in search of a home with better capabilities to sustain their livelihoods might not be the same as communities that are still intact or the communities that the migrants are inserted in. They may have special attachment to the land where they used to live before their migration, which they could value as part of who they are. For this reason, granting them special group rights would allow the migrant communities to be able to preserve their cultural and historical identities, especially in the event that they are forced to move outside of their countries.

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<sup>204</sup> BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM*, CAMBRIDGE, MA: HARVARD, 728 (2001).

<sup>205</sup> Kymlicka *Supra* note 200, at 121.

<sup>206</sup> *Id.*

#### **4. Conclusion**

Reducing vulnerability does not only mean reducing greenhouse gas emissions, it also means reducing inequality because social vulnerability- Hence CCIM can be seen as a problem of social justice, an outcome of the gap that exists between the “haves” and the “have-nots”. The communities that are most hard hit are characterized by limited resources, a lack of education and poverty. The theory behind seeing CCIM as a problem of social justice is that emissions resulting from human activities enhance the greenhouse effect. Hence since the intensification of climate change is due to the activities of human beings, presumably we should also be in a position to solve it as well.

## CHAPTER 3

### THE PRACTICAL CHALLENGE: VARIABILITY OF VULNERABILITIES ACROSS CLIMATE CHANGE HOTSPOTS

Drawing on the literature covered in chapter two, on the scientific background of climate change induced migration and the connection between migration and vulnerability, this chapter details the impact of CCIM on select communities. I examine secondary data from reports by governmental and non-governmental agencies to show how CCIM is perceived and experienced in three regions- North East Africa (Eritrea), South Asia (Bangladesh) and the Pacific region (Kiribati). I chose these three areas because the IPCC identifies these three areas as climate change hotspots.<sup>207</sup> Climate change hotspots are areas that have already experienced and will continue to experience climate change impacts as acknowledged by peer reviewed scientific report, and these impacts will be worsened by other anthropogenic activities. In drought infested East Africa, for instance, Somalis have been moving across the Kenyan border to flee, inter alia, drought and this is exacerbated by political instability. Although there are many instances where people happen to be displaced forcefully or move because of gradual degradation, for the sake of convenience because it is impossible to cover all such situations, only three case studies have been chosen. These case studies have been chosen as representatives of the wide array of possible scenarios of displacement caused by climate change. Each of the case studies contains strong and obvious evidence of environmental degradation or disaster.

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<sup>207</sup> See <http://www.climatehotmap.org/about/climate-hot-map.html> (last visited Jun. 21, 2016)

The chapter is based on primary data collected by myself. The chapter is also a review of secondary sources on the impact of global climate change and local environmental and other conditions. It is a systematic analysis of a desk research based on data collected by individual and institutional level researchers to show the consequences of climate change related displacement and the divergences in the protection needs of different communities based on the nature and type of disaster involved, the temporal dimension of their displacement, the underlying socioeconomic conditions of the communities, etc. The primary data collected for this chapter is based on conversations I had with people from the three countries and on personal observation. I lived in Eritrea from 1992-2009. My case study for Kiribati is based on interviews I conducted, some news articles, documentaries and email exchanges with people who have firsthand knowledge of the island nation- who have lived there and worked there. I met and interviewed three I-Kiribati; Ross, Lulu, and Mike. I also had the opportunity to interview Michael Nash- documentary filmmaker who worked in that area, and two people who were connected to an I-Kiribati man who had asked for asylum in New Zealand and had been unsuccessful. Michael Kidd- a lawyer and Kenneth Weiss- journalist.

The main issue that the chapter grapples with is the question of vulnerability and the role of law in addressing climate change related vulnerability and displacement in the three chosen regions: how situations of environmental degradation translate into disasters that could contribute to the creation of vulnerable populations or add to already existing vulnerabilities.

As seen in the previous chapter, the difficulty in responding to climate change in general and CCIM in particular, lies in the complexities that are inherent in the dynamics of disaster formation- the unique ways in which the underlying

vulnerabilities interplay with environmental events in different circumstances. An in depth study of the people who are affected and the types of environmental disasters that cause their vulnerability could provide a basis for formulating meaningful responses which are not merely focused on a least common denominator or one-size-fits-all approach but rather one that takes into account the particularities of the needs of communities affected by CCIM.

The case studies demonstrate a clear correlation not only between movement and the impacts of climate change, but also between socioeconomic and political position and movement. A combination of bad political choices and preexisting socioeconomic poverty added to unfavorable environmental events create conditions for a disaster. Even after being exposed to the same environmental threat, different people experience the losses differently. This corroborates what has been postulated in the theoretical background in chapter 2- that CCIM is not only a story of the environment but it is also a story of the inequality that exists among individuals, households, communities, states, and regions in terms of political power, vulnerability and resilience. Disaster is mediated by political, socioeconomic and cultural factors and from this perspective; it is man-made rather than natural. Political choices are made by those in power, by the social and political elites who determine whether a situation will devolve into a disaster or not, which makes climate change migration a socioeconomic and political problem.

This is not to discount the possibility of the occurrence of certain threats that could be completely devastating- destroying infrastructures and affecting everyone equally. Extreme environmental degradation reduces the carrying capacity of an area.<sup>208</sup> A

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<sup>208</sup> In geography, the carrying capacity of a region is the largest size of a population that the resources of the region can support with normal seasonal variations and “indefinitely without significantly depleting or degrading those resources.” *See*

purely physical approach argues that at a point where degradation minimizes the carrying capacity of a certain area, migration becomes inevitable. However, even in these situations, although the degree of threat presented by the environmental condition is an important factor, socioeconomic and political power can afford an advantage in terms of the ability to flee from harm or to reconstruct one's life and livelihood after the harm has passed.<sup>209</sup> Another way to look at it is that those with the means and flexibility to adapt stay, whereas those that do not have the same flexibility will be displaced or will be forced to move. For instance, those who have limited education or whose means of subsistence depends on the climate move in search of a new place where they can practice their livelihood. Because of the diverging particular protection needs of each of the displaced groups, identifying a least common denominator approach to identifying causes, consequences or needs may not adequately conceptualize the movement.

Finding a common thread characterizing underlying community or individual vulnerability which ultimately gives rise to forced displacement- a least common denominator approach- is hard. The differences among the regions in terms of the nature of harm faced, the vulnerabilities, and nature of displacement all point to the conclusion that there is no one panacea for response.

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<https://www.wou.edu/las/physci/ch371/lecture/popgrowth/carrying.htm>. (last visited Jun. 21, 2016); see also Foodprints and Foodsheds Project, *Carrying Capacity: A Measure of Land Resources*, <http://foodprintsandfoodsheds.org/carrying-capacity-a-measure-of-land-resources/> (last visited Jul. 14, 2016).

<sup>209</sup> For e.g. because of lack of resources some who are affected are unable to move, even if they are incapable of adapting to the change.

## 1. Africa

Below is a summary of how climate change has affected and continues to affect the African continent. The IPCC reports show that no region in Africa stands to gain from climate change, although it is the continent that has contributed the least amount of GHGs to the atmosphere in terms of current flows and existing stocks.<sup>210</sup> Several studies and news reports have shown that in a large portion of Africa, the climate has been changing even though the exact nature of the change is not uniform throughout the whole continent. As global mean surface temperature is projected to increase by 1.5°C and 6°C by 2100 and sea levels are projected to increase by 15-95 centimeters, an increase in average temperature, ranging from 0.2°C to more than 0.5°C per decade is expected to occur across Africa.<sup>211</sup> The multiple effects of climate change are already being felt in a number of different ways in Africa.<sup>212</sup> The particular economic situation of the African continent exacerbates the ramifications of climate change and

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<sup>210</sup> If one takes the year 2007 for instance, the per head emissions of carbon dioxide in the whole of Africa stood at 1 in comparison with a world average of 4.3, in comparison to US figure of 19.9, the EU 6.9 and China 3.2. South Africa was the only exception which had per head emissions of 7.9 in 2004, this being attributable to its reliance on coal generated electricity. Historically, Africa had contributed 2.3 percent of carbon dioxide emissions by 2004 whereas the EU 15 had contributed 11%, the US 20% and China 17.3%.

<sup>211</sup> . TOULMIN *Supra* note 57.

<sup>212</sup> *Id.* at 24. *See also*, IPCC 2001 The long term slow onset environmental harms include *inter alia*, biodiversity loss, shortage of potable water, drought, abnormal seasonal variations, increased aridity, sea level rise, coastal erosion, deforestation, loss of forest quality, woodland degradation, coral bleaching, shorter rainy seasons, and retreating of glaciers. The IPCC reports that Mount Kilimanjaro has already lost around 82% of its icecap since 1912 and predicts that the rest will vanish in less than two decades. The sudden onset disasters on the other hand include cyclones, and flooding. *See also*, Warasme et al, 1995. Water stress and biodiversity loss affect the farming capacity and food security of around 70 percent of the African population that lives by farming. Moreover, the changing climatic patterns are also possibly contributors to increased health problems. Changes in rainfall affect the presence and absence of vector and water borne pathogens. For e.g. mosquito reproduction will increase with increased occurrence of flooding and malaria will become a health hazard in places that were formerly dry. The inability of many communities to cope with increased disease can aggravate the situation. IPCC 2001. The lack of coping capacity makes the problem direr.

makes adaptation difficult. This is especially true for communities that suffer from rampant poverty and food insecurity.

The diversity of the African landmass renders making generalizations about the whole continent difficult.<sup>213</sup> With a surface area of 30 million square kilometers, Africa is seven times larger than the current EU and three times the size of China.<sup>214</sup> Despite the diversity of the region however, some notable common characteristics are that the people depend heavily on natural resources, and have very low levels of income per head.<sup>215</sup> High levels of inequality and limited government capacity to deliver services to the majority of people are also pervasive across the continent. Attaining food security remains one of the priorities of many Sub Saharan African countries.<sup>216</sup>

With the exception of South Africa and some parts of Northern Africa, there is limited industrialization.<sup>217</sup> Agriculture is the backbone of the economies of the majority of African countries; seventy percent of the population lives by farming and one third of Africa's income is generated by agriculture.<sup>218</sup> Willis Oluoch-Kosura says 70% of the

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<sup>213</sup> Undertaking a desk study of the whole region of Africa is not very feasible for the purpose of this study. Hence, I will focus on some aspects of the impact of global climate change in two regions: East Africa and the Horn and the Sahel region. *See* Toulmin, *supra* note 57.

<sup>214</sup> Agriculture: Pastureland Intensity, <http://sos.noaa.gov/Datasets/dataset.php?id=331> (last visited Mar. 27, 2016).

<sup>215</sup> Agricultural Growth, Poverty Reduction and Millennium Development Goals in Africa Outcomes of AAAE Conference Aug. 18– 22, 2007 La Palm Beach Hotel, Accra, Ghana Editors: Elizabeth Nambiro, Musa N. Omare and Guy B. Nkamleu, available at [http://ageconsearch.umn.edu/bitstream/50144/2/Conference\\_Report.pdf](http://ageconsearch.umn.edu/bitstream/50144/2/Conference_Report.pdf) 331 (last visited Mar. 27, 2016).

<sup>216</sup> [http://ageconsearch.umn.edu/bitstream/50144/2/Conference\\_Report.pdf](http://ageconsearch.umn.edu/bitstream/50144/2/Conference_Report.pdf) (last visited Jun. 21, 2016).

<sup>217</sup> Africa's limited industrialization is further threatened by the large quantity of cheap Chinese products that come into the continent Globally, for the most part, African countries remain sources of raw materials and agricultural commodities.

<sup>218</sup> Willis Oluoch-Kosura, Africa Agriculture Status Report: focus on Staple Crops, Nairobi, Kenya: Alliance for a Green Revolution in Africa (AGRA, 2013).

extremely poor population living in rural areas depend on farm incomes for their survival.<sup>219</sup>

Diao et al note that agricultural yield in Sub-Saharan Africa depends on climate (and also other factors, including efficient and effective use of the factors of production agricultural inputs (fertilizers, irrigation, seeds, and capital equipment); and farmers' skills.)<sup>220</sup> Heavy reliance on rain-fed subsistence agriculture and pastoralism makes the ability of communities to survive and thrive very dependent on the weather. A slight change in any component of the climate system could have a significant negative effect on the food system and on these livelihoods and ultimately threaten food security. Climate variability disrupts seasonal shifts and rainfall patterns, which curb rain-fed agriculture and pastoral activities. In addition, some plant species may not be able to survive in certain climates. In addition to the inherent loss of value because of depletion of biodiversity, people's access to the consumptive and non-consumptive benefits derived therefrom are limited.<sup>221</sup> In addition to that, warming causes the thawing of glaciers<sup>222</sup>, and simultaneously depletes water supply.

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<sup>219</sup> Willis Oluoch-Kosura, Africa Agriculture Status Report: focus on Staple Crops, Nairobi, Kenya: Alliance for a Green Revolution in Africa (AGRA, 2013), [http://ageconsearch.umn.edu/bitstream/50144/2/Conference\\_Report.pdf](http://ageconsearch.umn.edu/bitstream/50144/2/Conference_Report.pdf) (last visited Jun. 21, 2016).

<sup>220</sup> Diao, Thurlow, Benin, & Fan, 2012. Cited in Willis Oluoch-Kosura, Africa Agriculture Status Report: focus on Staple Crops, Nairobi, Kenya: Alliance for a Green Revolution in Africa (AGRA, 2013).

<sup>221</sup> Consumptive uses include food, fiber, fuel, shelter, and medicine; non consumptive such as trade, ecosystem services and the tourism industry.

<sup>222</sup> There has been a dramatic but gradual disappearance of glaciers on Mount Kilimanjaro (IPCC 2001). An estimated 82 % of the icecap that crowned the mountain when it was first surveyed in 1912 is now gone. The rest of the glaciers could vanish in the next 15 years. Other glaciers in Africa (Ruwenzori in Uganda and Mount Kenya are also under threat.

## Eritrea

*“Eritrea is a small and isolated country; conditions in the “North Korea of Africa” probably would not have attracted much attention if they weren’t a major driver of the worst migrant crisis facing Europe in decades. Eritreans account for about a quarter of the migrants trying to reach Europe and are the second-largest group by nation, after Syrians.”*

*Joshua Keating*<sup>223</sup>

This section outlines the different conditions that interact to create vulnerabilities that cause people to migrate within and outside of Eritrea. It highlights the vulnerabilities experienced, pre-movement, during and post-movement. Although there is not enough evidence to suggest that all those who leave Eritrea are fleeing the effect of climate change, there is unequivocal evidence that some are moving because of the interaction between climate change impacts and other problems, such as the repressive government and the failure of government to assist them which causes people to lose hope and have no choice but to flee. It also chronicles vulnerabilities at various stages of the movement: pre-movement vulnerabilities include the harsh human rights conditions, and sometimes interacting with the impacts of climate, during movement, the unsafe transit and post-movement, the treatment in the host country.

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<sup>223</sup> Joshua Keating, *The Eritreans Dying to Reach Europe Aren’t Looking for Jobs. They’re Fleeing a Nightmare*. Available at [http://www.slate.com/blogs/the\\_slatest/2015/06/09/the\\_eritreans\\_dying\\_to\\_reach\\_europe\\_aren\\_t\\_looking\\_for\\_jobs\\_they\\_re\\_fleeing.html](http://www.slate.com/blogs/the_slatest/2015/06/09/the_eritreans_dying_to_reach_europe_aren_t_looking_for_jobs_they_re_fleeing.html). (Last visited Mar. 22, 2016).

## **i. General Background**

Eritrea is a poor developing country situated in the horn of Africa. Its ecosystem has been tremendously impacted by decades of war and climate change.<sup>224</sup> Because of its strategic location on the Red Sea Coast, for generations, Eritrea has been a favorite target of colonial and invading powers from within and outside of the continent of Africa. It has had autonomous governance since 1991.<sup>225</sup>

Eritrea has one of the most repressive governments in the world. Ever since the country got its independence, it has been a one-party state. We have had no elections. In 1998, a border conflict which had been brewing for a while broke out with Ethiopia. The effects of the war were devastating for the Eritrean people. At that time, the government issued a state of emergency- suspending the ratification and coming into

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<sup>224</sup> It has a surface area of 124,320 square kilometers with a 1200km coastline and 350 islands. (as per the Eritrean government and government approved elementary school level Geography textbooks). The CIA World Factbook however puts the surface area of Eritrea at 117,600 square km. It's not clear why there is this discrepancy. See <https://www.cia.gov/library/publications/the-world-factbook/geos/er.html> (Last visited Mar. 18, 2016).

<sup>225</sup> These invaders and colonizers included the Ottoman Turks and Egyptian pashas (before the 20<sup>th</sup> century) and Italy (1890- 1941), Great Britain (1941-1951) and Ethiopia (1951-1991). Eritrea was the first Italian colony in Africa. After the defeat of the Axis powers in the Second World War, the UN convened to decide the fate of Eritrea. After some discussion on Eritrea's economic viability, the UN decided to put it under a temporary federal arrangement with the Empire of Ethiopia was federated with Ethiopia as a temporary measure in 1952. The CIA World Fact Book describes this as "the UN [establishing] Eritrea as an autonomous region within the Ethiopian federation". See <https://www.cia.gov/library/publications/the-world-factbook/geos/er.html>, (Last visited Mar. 18, 2016). Ethiopia abrogated the federal arrangement and fully annexed Eritrea as a province of Ethiopia ten years later. A group of Eritreans who were discontent with the Ethiopian administration started an armed struggle for independence in the Eritrean lowlands in September 1961. Most Eritreans, who had a strong sense of national identity, saw Ethiopia's annexation as colonization and never recognized the tyrannical rule of the Ethiopian emperor, Haile Selassie as legitimate. So, while the rest of the world thought the war was a civil war, for Eritreans it was a struggle to assert our self-determination and not a struggle for cessation. After a long and devastating war that lasted 30 years, Eritrea got its independence from Ethiopia in 1991 and was granted membership to the UN in 1993, after an overwhelming majority of the Eritrean public (98.5% of registered voters) voted for independence in a referendum in April 1993. It was the 52<sup>nd</sup> African state to gain independence. Subsequently it was granted membership in the UN and the OAU in May 1993. See also, <http://www.nationsencyclopedia.com/Africa/Eritrea-HISTORY.html#ixzz43JOIETJi> (last visited Jun. 21, 2016)

force of the constitution. Therefore a number of fundamental rights and freedoms are severely restricted.<sup>226</sup> Since 1991, there has been one president and only one party is allowed. The Eritrean government requires every Eritrean citizen between the ages of 18 and 40 to undergo military training as part of the national service program. However, since the 1998 border conflict, the term of the military and national service has been indefinite- sometimes leaving the decision to be demobilized at the discretion of one's national service supervisor. A study by Professor Gaim Kibreab, of London South Bank University shows that of the 215 people he interviewed the average number of years they served in the Eritrean military was six and a half years- with some who had served more than a decade.<sup>227</sup>

## **ii. Vulnerabilities and Movements**

Next to Syria, Eritrea is one of the biggest sources of refugees crossing the Mediterranean into Europe.<sup>228</sup> Because of bleak human rights and economic conditions a lot of Eritreans cross the border to neighboring countries- Sudan or Ethiopia- in hopes of finding a way to get to Europe or to Israel. These travelers are vulnerable to a number of dangers during the journey. However, a very large number

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<sup>226</sup> These include freedom of religion, freedom of the press, freedom of conscience, freedom of assembly and movement, etc.

<sup>227</sup> C.L., *National service in Eritrea, Miserable and useless*, Mar. 10, 2014, <http://www.economist.com/blogs/baobab/2014/03/national-service-eritrea>. (Last visited Mar. 22, 2016). The Article says, "around one in 20 Eritreans currently live in vast barracks in the desert. They work on reconstruction projects, such as road building, and earn no more than \$30 a month. They cannot go to university or get a formal job unless they have been officially released from military service. Since conscription became open-ended in 1998, release can depend on the arbitrary whim of a commander, and usually takes years." The government talks about "finding opportunities for demobilized members of the Eritrean national service"; a seemingly empty promise with no concrete plans about when and how this will happen.

<sup>228</sup> It is estimated that around 4,000 cross the border illegally each month, even though there is a strict shoot-to-kill policy at border crossings. *See* [http://www.slate.com/blogs/the\\_slatest/2015/06/09/the\\_eritreans\\_dying\\_to\\_reach\\_europe\\_aren\\_t\\_looking\\_for\\_jobs\\_they\\_re\\_fleeing.html](http://www.slate.com/blogs/the_slatest/2015/06/09/the_eritreans_dying_to_reach_europe_aren_t_looking_for_jobs_they_re_fleeing.html). (Last visited Mar. 22, 2016).

of people continue to cross the borders in spite of the dangers that are associated with such an odyssey. The dangers include the possibility of becoming a victim of the Eritrean government's shoot to kill policy at the border, war in neighboring countries, predatory human traffickers, and very unsafe traveling conditions often resulting in death.

The journey usually begins by paying a smuggler who promises to bring the person to safety. The smugglers may make good on their promise to take the person to the final destination, but there are also many stories of smugglers who turn trafficker. There are also situations where refugees are captured by and maybe sold to traffickers. Some fall into the hands of traffickers in the desert in Sudan, Sinai and Libya. In August 2013, while working with This American Life, I was able to listen to several hours of phone calls with a group of Eritrean refugees who were being held hostage and sometimes tortured in an underground facility in the Sinai desert.<sup>229</sup>

Here are a few excerpts from their phone calls.

M says, "I'm 20 years old. It's been 7 months since left Eritrea. I was kidnapped as I was crossing border by Rashaida<sup>230</sup>. I was in a refugee camp, but I left Shigwar refugee camp because there was nothing to do there. I got a job as a harvester, working for 6 Sudanese pounds a day. My boss refused to give me my salary after I

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<sup>229</sup> The full story is available at, <http://www.thisamericanlife.org/radio-archives/episode/502/this-call-may-be-recorded-to-save-your-life>. (last visited Mar. 22, 2016).

<sup>230</sup> The Rashaida are a Bedouin- nomadic ethnic group who live in the deserts of Eritrea, Sudan, and Saudi Arabia. (on the Red Sea Coast) See also, <http://www.madote.com/2010/02/eritrea-rashaida-people.html>. (last visited Mar. 22, 2016). They live in tents and they are the only truly nomadic people left in Eritrea. Mohamed Fadlalla, (2005) P. 20, cited on <http://www.madote.com/2010/02/eritrea-rashaida-people.html> (last visited Mar. 22, 2016) Although the Eritrean government has been trying to get them to settle and has set aside land for them if they choose to do so, it has largely been unsuccessful.

had been working for 2 months. The owner said he'll call the Rashaida on me or go elsewhere without getting paid, we got into fight with man"<sup>231</sup>

R says, "I was kidnapped [] while working as harvester. Owner said I will pay your salary in Kassela, just go with those people. I boarded a car, which took me all the way to Sinai. [These people] sold us to other [Bedouins]- the Egyptians."<sup>232</sup>

B says, "Some of us were in UNHCR camp and some of us were not. Some of us were trying to work as harvesters on farms. There is no such thing as security or police presence in that area. There is no such thing as blockades or checkpoints and government cannot control whole country, lawless country."<sup>233</sup>

Z says, "I was walking to the farms [to look for a job], ran into someone on the way, that person promised to take me to refugee camp, ended up taking me to the Rashaida."<sup>234</sup>

A good percentage of them say that they were living in a refugee camp in Sudan when they were captured and taken hostage by the Rashaida, a Bedouin tribe roaming between the coasts of Eritrea and Sudan.<sup>235</sup> Although the Bedouins in the Sinai were the captors and guards who kept their hostages in "houses, shacks and shipping

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<sup>231</sup> Translated from Tigrigna; source, recording of phone calls made to Meron Estifanos, journalist, ERENA. Transcribed and translated by Bealfan Hayle and Hanna Haile, for This American Life (Aug., 2013).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> One of the former hostages that I interviewed, B was 22 when he was captured. He was living in a refugee camp in Sudan in 2010 and working on a farm when he was kidnapped and taken to Sinai. In the phone call, he says that there were 29 people in the underground facility where he was being held.

containers”, a complex network of criminals in several places around the world were involved in the different aspects of the trafficking, such as the collection of ransoms. During my interview with B, a former hostage who at the time was living in Israel, he suddenly said to me, “Hanna, I want to ask you a question; I’m a little bit scared, because the traffickers have brothers or friends in Israel. Why are you asking me all these questions? Do I have a guarantee that I will be safe?”<sup>236</sup>

Another vulnerability that these people encounter along their journey relates to unsafe traveling conditions. For e.g. once someone reaches the Mediterranean, they pay a smuggler to transport them across the sea to Europe. The boats they board are usually unseaworthy, overloaded, have poor equipment and often insufficient fuel to reach Europe.<sup>237</sup> Quite often they have tragic ends. For example, in October 2013, a ship carrying hundreds of Eritreans had an accident off the coast of Lampedusa, Italy. Over 300 people reportedly died at sea on October 3, 2013.<sup>238</sup>

While the above chronicles what movement outside of Eritrea to the North and West of Eritrea looks like, it does not tell the full story. I argue that even though climate change is not the singular driver of movement, it does add fuel to an already flared up situation in the case of Eritrea.

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<sup>236</sup> Phone conversation with “B”, Eritrean refugee and former hostage in the Sinai Peninsula.

<sup>237</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *Central Mediterranean Route* (2016), <http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/> (last visited Mar. 22, 2016).

<sup>238</sup> <http://www.spiegel.de/international/europe/lampedusa-survivors-one-year-after-the-refugee-tragedy-a-994887.html> (last visited Jun. 21, 2016).

### iii. The Face of Climate Change in Eritrea

Eritrea is in the arid and semi-arid region of the Horn of Africa. 70 percent of the Eritrean territory is classified as hot and arid and receives an average annual rainfall of 350 mm. It relies heavily on agriculture for the generation of its Gross Domestic Product.<sup>239</sup>

Many anthropogenic activities such as war, overgrazing, and natural hazards, drought, unreliable rainfall, have left the country desolate.<sup>240</sup> Eritrea's natural resources have also been degraded due to long wars, recurrent droughts and unsustainable use. Some environmental problems that Eritrea is facing include, desertification, land degradation, diminishing biodiversity, emergence of new pests, incidence of diseases in new areas because of temperature rise, exacerbation of infectious diseases, floods in some places, drought in others. Like most places in East Africa and the Horn, Eritrea has been experiencing prolonged droughts and land degradation. Several reports show that the drought has gotten worse in recent years and has been described as one of the worst droughts that the region has ever experienced.<sup>241</sup> When there is heavy rain in the highlands during the rainy season, the lowlands get flash floods which exacerbate erosion because of the rain that comes down in torrential conditions.<sup>242</sup>

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<sup>239</sup> Ministry of Agriculture of the State of Eritrea, *Country Report to the FAO International Technical Conference on Plant Genetic Resources* (1996), available at <http://www.fao.org/fileadmin/templates/agphome/documents/PGR/SoW1/africa/ERITREA.pdf> (last visited Jun. 23, 2016).

<sup>240</sup> *Id.* at 9.

<sup>241</sup> See <http://www.newstatesman.com/world/africa/2016/01/world-s-next-crisis-drought-and-famine-horn-africa> (last visited Jun. 22, 2016); <https://freedomhouse.org/report/freedom-world/2012/eritrea> (last visited Jun. 22, 2016).

<sup>242</sup> Toulmin, *supra* note 57, at 15. The explanation given for this interesting phenomenon is due to its geographic characteristics including, its position in relation to the Indian Ocean, and the existence of the Ethiopian highlands, the rift valley and many lakes in the region. Toulmin says that although the overall rainfall is expected to increase by more than 10-20 percent, there will be a shift in its distribution with

A large portion of the Eritrean population is vulnerable to the ramifications of climate change because 70% of the population depends on subsistence cultivation and pastoralism for a living. Communities have low adaptive capacities, which are worsened by poverty.<sup>243</sup> It becomes even harder for the older subsistence farmers to adapt to changes in the environment and to produce adequate food, because their children would be in the military.<sup>244</sup> Every male member of some families could be a conscript working in the barracks in some remote place. The Eritrean government continually puts all resources into the military instead of addressing the needs of people who are at the mercy of the climate for their survival.

The whole region of East Africa has a high number of people who are either displaced within their own countries or who seek refuge in neighboring countries. Faced with a large number of displaced persons escaping not only environmental harm but also other crises, the UNHCR has labeled this as a “region of particular concern”.<sup>245</sup>

In 2011, the UNHCR and UNU conducted a study in refugee camps in Ethiopia to find out if there was a link between climate change and the decision to move and the findings indicated that negative shifts in climate was at least one of the reasons refugees fled to Ethiopia. They mentioned decrease in the amount of annual rainfall, scarcity of food, droughts, etc. The report also showed that displacement because of

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an increase from December to February and a fall in the regular rainy season, i.e. from June to August. The air temperature will increase in a range between 1.5-5.8 degrees Celsius by 2080.

<sup>243</sup> *Id.*

<sup>244</sup> <http://www.economist.com/blogs/baobab/2014/03/national-service-eritrea> (last visited Jun. 21, 2016).

<sup>245</sup> Beatrice Riché et al., *Climate-related vulnerability and adaptive-capacity in Ethiopia's Borana and Somali communities*, IISD REP. 83 (2009), [https://www.iisd.org/pdf/2010/climate\\_ethiopia\\_communities.pdf](https://www.iisd.org/pdf/2010/climate_ethiopia_communities.pdf) (last visited Jun. 21, 2016).

purely environmental factors was mostly internal, within the boundaries of the interviewees' countries. However, displacement/ movement because of environmental conditions and other issues such as violence tended to be cross boundary.<sup>246</sup>

The study claims that many noticed clear changes in weather in their home countries over the past 10–15 years and interestingly were able to see the difference between permanent changes and temporary weather shifts.<sup>247</sup> The study also shows that the changes affected the livelihoods of the refugees who were mostly farmers and pastoralists directly and others indirectly.<sup>248</sup> Crossing the border, the writers state, was usually a “measure of last resort and only taken after all efforts to adapt to the changing conditions had been exhausted”, including migration within their own countries and usually compounded by fear of political violence.<sup>249</sup> Arguably, the failure of the government to assist adaptation efforts could also drive people to cross borders. An Eritrean government spokesperson had pointed out that Eritrea is unable to cope with internal migration of large groups of people because of its limited resources.<sup>250</sup>

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<sup>246</sup> Tamer Affifi et al, *Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and the Horn of Africa*. available at, [http://reliefweb.int/sites/reliefweb.int/files/resources/East%20and%20Horn%20of%20Africa\\_final\\_web.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/East%20and%20Horn%20of%20Africa_final_web.pdf) (Last visited Mar. 22, 2016).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> The writers say the threat of political violence could be one reason.

<sup>250</sup> “*Climate-Proofing for the Future*”, available at <http://www.irinnews.org/fr/node/245723>. (last visited Mar. 22, 2016). In the words of Mogos Weldeyohannes, Director General of the Department of Environment of Eritrea in 2009, “We do not have enough water in the urban areas to support people who will move [if there is a severe drought]”, emphasizing that the government would not support a rural- urban move.

## 2. South Asia: Bangladesh

The IPCC identifies South Asia an area of the world that is particularly prone to the effects of climate change.<sup>251</sup> In addition, increasing monsoon rainfalls and melting of Himalayan glaciers, sea level rise is also resulting in dangerous coastal flooding and inundation.<sup>252</sup> Flooding caused by sea level rise also causes saline intrusion to rivers, causing a shortage of access to clean freshwater. In the future however, the IPCC anticipates that the disasters, such as floods, tropical cyclones and storm surges, will be even worse.<sup>253</sup> Even though some areas get heavy rainfall, others suffer droughts.<sup>254</sup> These climate change effects, have caused food production to decline, (because of water stress and increased occurrence of El Niño<sup>255</sup>, the production of maize, wheat

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<sup>251</sup> IPCC (2014), *supra* note.

<sup>252</sup> IPCC 2014, *supra* note, at 476. The following is information obtained from the 2014 IPCC report.

Between 2002- 2004 IPCC noted that there were serious and recurrent floods” in Bangladesh, Nepal and North East states of India. (resulted in the death of over 1000 with a loss of over 250 million dollars.) On 17 May 2003, floods in Southern province of Sri Lanka were triggered by 730 mm rain. (information provided by India Meteorological Department, 2002-2006; Dartmouth Flood Observatory 2003)

<sup>253</sup> See IPCC (2014), p. 476

According to the IPCC report of 2014, some other environmental hazards that South Asia is facing include increased intensity of cyclones/ typhoons, increased intensity of monsoons (all of these cause severe damages to life and property. Lal, 2001, 2003)

<sup>254</sup> South Asia: 50% of droughts associated with El Nino; consecutive droughts in 1999 and 2000 in Pakistan and NW India led to sharp decline in water tables, consecutive droughts between 2000 and 2002 caused crop failures, mass starvation and affected 11 million people in Orissa, droughts in NE India during the summer monsoon of 2006. See Webster et al (1998); See also, Lal, 2003, India Meteorological Department (2006).

<sup>255</sup> El Niño is a Spanish word meaning “the little boy” and it describes a complex weather pattern that occurs because of changes in ocean surface temperatures (temporary warming of the ocean surface in the central and east central Equatorial Pacific). This results in increased rainfall and flooding on land. See National Oceanic and Atmospheric Administration, *What are el Niño and la Niña?* <http://oceanservice.noaa.gov/facts/ninonina.html> (last visited Jul. 14, 2016).

and rice has decreased).<sup>256</sup> Some other problems include rapid thawing of thermofrost which decreases depths of frozen soils,<sup>257</sup> drying up of wetlands because of decline in rainfall<sup>258</sup>, Biodiversity loss, health risks and fatal heat waves, (causing the death of mainly the poor, elderly, daily laborers).<sup>259</sup> For some places in South Asia (India, Pakistan, Bangladesh and Nepal) environmental hazards linked to climate change exacerbate preexisting water shortages because of “rapid urbanization and industrialization, population growth, inefficient water use”.<sup>260</sup>

Bangladesh is one of the most vulnerable states to climate change. It is a low lying, densely populated delta nation with a large population in coastal or flood prone areas.<sup>261</sup> Because of flooding, cyclones and sea level rise, it has a high potential for large-scale human displacement.<sup>262</sup> Physical exposure to harm can significantly influence vulnerability for both human populations and natural systems- it can exacerbate existing socioeconomic or environmental vulnerabilities. The effects of climate change are aggravating many of the natural environmental hazards already faced by Bangladesh, including sudden-onset events such as flooding, storm surges,

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<sup>256</sup> IPCC (2014) at 475 (Citing Wijeratne (1996); Aggarwal et al (2000); In et al (2001); Fischer et al (2002).

<sup>257</sup> *Id.* citing Wang et al (2004).

<sup>258</sup> *Id.* at 478.

<sup>259</sup> *Id.* citing Lal, 2002

<sup>260</sup> *Id.*

<sup>261</sup> *See* Md Shamsuddoha, S M Munjurul Hannan, Khan Sajid Raihan, and Tanjir Hossain, Displacement and Migration from Climate Hot-spots in Bangladesh: Causes and Consequences (August 2012).

<sup>262</sup> *See Id.* *See also* MIT AND DOMINIQUE CARÉE ÉDITEUR, CLIMATE REFUGEES (MIT Press 2010).

cyclones and land loss. Sea level rise is anticipated to worsen many of these processes and to subsume up to 13 percent of Bangladesh's coastal land by 2080.<sup>263</sup> That 30 million people will be displaced from Bangladesh by 2050 are alarming predictions.<sup>264</sup> In a country that is heavily affected by frequent natural disasters, it is difficult to disentangle climate change related events from ordinary environmental processes. Seasonal flooding: affects between 500,000 to one million people every year. On average, Bangladesh is hit by a tropical cyclone once every 3 years.

Jane McAdam and Ben Saul ask to what extent climate change is likely to impact displacement and migration in and from Bangladesh and what the legal and policy frameworks that might respond to this are.<sup>265</sup> They suggest that the best way to deal with movement in 50 or 100 years is to deal with the causes of Bangladesh's vulnerabilities now- investing in economic and social development. They recommend that adaptation and strengthening and progressive development of domestic, regional and international legal frameworks.

McAdam and Saul challenge the assumptions that there will be mass cross border displacement, which will threaten security by 2050 and require regulation through a new international treaty. Bangladesh already has a large number of people who are displaced by flooding as a result of effects of climate change. The Bangladesh coasts

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<sup>263</sup> Displacement Solutions, *Climate Displacement in Bangladesh The Need for Urgent Housing, Land and Property (HLP) Rights Solutions* (May 2012), <http://displacementsolutions.org/wp-content/uploads/DS-Climate-Displacement-in-Bangladesh-Report-LOW-RES-FOR-WEB.pdf> (last visited Jul. 14, 2016). Citing James Pender, *Community-led Adaptation in Bangladesh*, *Forced Migration Review* 31 (2008), p54, citing research by the UK Institute of Development Studies, available at: <http://www.ids.ac.uk/climatechange/orchid>.

<sup>264</sup> The National Geographic Magazine, *The Coming Storm*, <http://ngm.nationalgeographic.com/print/2011/05/bangladesh/belt-text> (last visited Jul. 14, 2016).

<sup>265</sup> Jane McAdam and Ben Saul, *Displacement with Dignity: International law and policy responses to climate change migration and security in Bangladesh* (2010).

are particularly prone to the effects of sea level rise and extreme weather because they are low lying. Some groups have already begun to organize for climate justice and their basic human rights.<sup>266</sup> Most of the displacement is predominately internal rather than cross border.

Scott Leckie et al, point out that while the global community is arguing about climate change, the effects of climate change are all too real for the people of Bangladesh- as the “worst case nightmare climate scenario is already real.”<sup>267</sup>

Stressing the injustice, advocating for a global approach in the way that burdens are shared, the founder of the Bangladesh Centre for Advanced Studies, a multidisciplinary research center that has led the study of the socio economic impact of climate change, Dr. Atiq Rhaman says, “For Bangladesh, which is already suffering from the effects of political negligence and numerous natural disasters, global warming is the final critical factor, the straw that breaks the camel’s back. Although our country produces only 0.3 to 0.4 % of total worldwide greenhouse gas emissions- less than the city of New York- we must work to reduce them. It is our moral duty. But at the same time, if the rest of the world does nothing, a major humanitarian disaster will be the result. Who will be to blame for that?”<sup>268</sup>

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<sup>266</sup> Interview with Scott Leckie, Director and Founder, Displacement Solutions, (Mar. 10, 2016).

<sup>267</sup> Scott Leckie et al, *Bangladesh’s Climate Displacement Nightmare*, available at <http://displacementsolutions.org/> (last visited Jun. 21, 2016).

<sup>268</sup> Donatien Garnier, *Bangladesh, Sandarbans, the Great Overflow*, in *CLIMATE REFUGEES: Collective Argos* (2010).

### 3. Low Lying Island States

Low lying small island states are portrayed by the media as the ground zero of climate change, sometimes conjuring images of islands sinking into the sea. In particular, the island nation of Tuvalu has been dubbed “the new Atlantis- the nation that will be completely destroyed because of sea level rise.”<sup>269</sup> In 2006, Al Gore presented his documentary, “An Inconvenient Truth”<sup>270</sup>, where he mentioned in passing that some “Pacific islands had already disappeared because of sea level rise and many of the inhabitants had to be evacuated.”<sup>271</sup> Media coverage of a handful of “climate change refugee” cases brought to courts by citizens from these island nations also conjure up images of people fleeing on boats. Although these are overgeneralizations not fully based on factual evidence, it is true that small island islands are particularly vulnerable.

In this section, I look at how vulnerability is experienced in small island states and the legal and policy challenges facing the region. By doing a case study of Kiribati, I look at how climate change is experienced by I-Kiribati and the on the ground activist efforts to address the impacts and find policy and legal solutions. This region is particularly interesting because the issues raised are somewhat different from other regions.

According to the IPCC, the risks of climate change and the ensuing sea level rise are

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<sup>269</sup> Bernicee Walt, Tuvalu. The New Atlantis: how Tuvalu is being affected by global warming. (Mar. 2012). <https://prezi.com/tjhji4vs3d1i/tuvalu-the-new-atlantis/> (Last visited Mar. 23, 2016).

<sup>270</sup> Participant Productions. *An Inconvenient Truth*. Widescreen version enhanced for 16:9 TVs. Hollywood, Calif.: Paramount, 2006.

<sup>271</sup> *Id.*

multiple and complex for small low lying islands.<sup>272</sup> A lot of these islands are low lying and small and hence prone to flooding and coastal erosion.<sup>273</sup> As coastal areas become inundated, sea water seeps into arable land and water supplies, causes erosion, drought and land loss.<sup>274</sup> There is agreement that the islands will become completely uninhabitable over time, but before that happens in the short run, there are many problems that the islanders are facing that need to be addressed such as increased salination of fresh water, coastal flooding and erosion.<sup>275</sup> Eventually there might be a need to leave their islands completely. International migration, backed by a theory of cosmopolitan justice, seems to be the best long term solution. There are countries that already have good diplomatic relations with some other country and migration pathways are open to them to some degree. Tokelau and Maldives for e.g., have access to the USA.<sup>276</sup> Migration from nations with small populations like, Tuvalu would be more manageable because its population is only about 9 thousand. New Zealand has the same arrangement with Kiribati, but only provides access (labor migration) to about 75 people (from a population of more than 100,000) every year.<sup>277</sup>

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<sup>272</sup> Mimura, N., L. Nurse, R.F. McLean, J. Agard, L. Briguglio, P. Lefale, R. Payet and G. Sem, 2007: Small islands. Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 687-716, <https://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter16.pdf> (last visited Mar. 27, 2016).

<sup>273</sup> *Id.*

<sup>274</sup> *Id. Also*, Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>276</sup> *Id. Also*, Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>277</sup> Kiribati cut off diplomatic ties with the former colonizer- the UK in 1979. Hence, there is no migration pathway to the UK for Ikiribati. Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

The total population of all these small island nations combined is less than half a million; hence, allowing them to resettle somewhere else may not be such a big challenge. However, if and when that resettlement happens, many legal scholars are asking what happens to the state; does it continue to exist in the absence of physical territory; which then leads to a discussion of what territory is, and whether territory is the physical object itself or intangible rights (dominion) over that physical object. I argue that the intangible aspect is more important. Safety is just as important as the right to keep one's identity and self-determination. As stated by a Kiribati NPO, Kiribati Keepers, "[the aim] is to keep Kiribati and its people safe and sovereign, thriving as independent, equipped, and empowered residents living in places where their culture and way of life is respected."<sup>278</sup>

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<sup>278</sup> *Id.*

## **Kiribati**<sup>279</sup>

*“You don’t see us in the media, learn about us in school, or hear about us on religious platforms or political stages. I think it is because our story scares people. We come from lands which rise no more than a few feet (1 - 3 meters) above sea level. When glaciers melt, sea-levels rise. Our houses flood, crops die, land is lost, and well water is salinized. Without fresh water, there is no life. The world ignores us because it is too difficult to recognize us. We represent a large-scale moral and ecological catastrophe. Values which have centered on profit for some, have resulted in pain, pollution, and suffering for others. As a result, we are living through a modern day eco-genocide. This is not our fault. We have nowhere to go. We need help. We need people to share our story.”*<sup>280</sup>

*From Humans of Kiribati*

### **i. General Background**

Scattered over 3.5 million kilometers in the central tropical Pacific Ocean lies a group of 33 atolls and one raised coral island, making up the small island nation of Kiribati. The average altitude of the atolls is 2 meters above sea level.

The actual land area of the country however only comes to 313 square miles. Most of the islands are low lying atolls except for Banaba with its peak of 266 feet, which is

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<sup>279</sup> Scattered over 3.5 million square kilometers of water body (1.35 million square miles of ocean) in the central tropical Pacific Ocean lies a group of 33 atolls and one raised coral island, making up the small island nation of Kiribati.

<sup>280</sup> Humans of Kiribati, available at <https://www.facebook.com/humanofkiribati/>, (Last visited Mar. 19, 2016). This is a platform for Kiribati people to tell their story about how climate change is affecting their lives (but also makes mention of other island nations which are also affected in the same way- Tuvalu, Tokelau, Marshall Islands, and the Maldives). The community was created to introduce “the people living on the frontlines of climate change” because “most don’t know [they] exist”.

the highest point on the territory. The average altitude of the atolls is 2 meters above sea level.<sup>281</sup> Kiribati was colonized by the British and only got its independence in 1979.<sup>282</sup> The country had high reserves of phosphate, which the British depleted completely before it obtained independence.<sup>283</sup> Currently, the population of Kiribati is 105,711 people- a large portion of which lives on the capital island of Tarawa.<sup>284</sup> Many have moved from the other islands to the capital because of poverty, scarcity of fresh groundwater and the environment being less able to meet the needs of the growing population.<sup>285</sup> Recently, because of sea level rise associated with global warming and coastal erosion, some areas on the atolls have come under water.<sup>286</sup> For this reason, climate scientists have been predicting that this island nation's very existence is threatened because of the ramifications of global warming. Because of problems related to climate change, many Kiribati citizens move to Australia or to

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<sup>281</sup> See <https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html> (last accessed Jul. 14, 2016). See also Mr Fiu Mataese Elisara, United Nations University – Institute of Advanced Studies, Secretariat of the United Nations Permanent Forum on Indigenous Issues, North Australian Indigenous Land and Sea Management Alliance (NAILSMA), International Expert Group Meeting on Indigenous Peoples and Climate Change, (Darwin, Australia, APRIL 2-4, 2008).

<sup>282</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html> (last visited Jul. 14, 2016). See also <https://www.princeton.edu/~pcwcr/reports/kiribati1979.html> (last visited Jul. 14, 2016).

<sup>283</sup> See <https://www.britannica.com/place/Banaba> (last accessed Jul. 14, 2016); BBC News, Timeline: Kiribati, (Sept. 29, 2011); [http://news.bbc.co.uk/2/hi/asia-pacific/country\\_profiles/2944816.stm](http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/2944816.stm) (last visited Jul. 14, 2016); <https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html> (last visited Jul. 14, 2016); and BBC News, *Kiribati profile – Timeline*, (Jun.23, 2015), <http://www.bbc.com/news/world-asia-pacific-16433905> (last visited Jul. 14, 2016).

<sup>284</sup> This is an estimate as of July 2015. <https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html> (last visited Jul. 14, 2016).

<sup>285</sup> Interview with Kaeruru (Lulu) DeBoar, filmmaker and I-Kiribati climate change activist, producer of Millenium Island, upcoming documentary on the resilience of the I-Kiribati in the face of climate change (Mar. 10, 2016). Also, Interview with Ross Maitinnara, I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 10, 2016).

<sup>286</sup> *Id.*

New Zealand in search of a better life.<sup>287</sup>

For the purpose of writing this part of the dissertation, I interviewed three Ikiribati, one of whom is an American who adopted Kiribati identity for half of his life. Ross Maitinnara is an Ikiribati and a climate change activist. Ross lived in Kiribati for most of his life but currently lives in the USA about to start studying at a university in Georgia. He is one of the founders of “Kiribati Keepers” which is an NPO that works to “provide disaster relief and to help contribute to the relocation effort of citizens”.<sup>288</sup> The website further notes, the islands will soon be “deemed uninhabitable due to cyclones, king tides, and sea water invasion onto their tiny, atoll islands.”<sup>289</sup> When I was doing this research, Kiribati Keepers was collecting money to rebuild a Tarawa hospital that was flooded because of Cyclone Pam.<sup>290</sup>

Lulu DeBoar is half Ikiribati. She is a filmmaker and a climate change activist. Lulu is currently making a documentary called “millennium island” which aims to provide a resilient picture of the way that Ikiribati are coping with climate change on a daily basis. When I interviewed her, she was in Tarawa, in Kiribati. When our Skype connection seemed to not be working, she stepped outside her house and was by the sea shore; which is perhaps not too surprising as the atoll is quite narrow and the ocean is not far from any point on the island. The clear blue of the sky and the ocean looked beautifully united. Lulu pointed out that this was low tide and that was why there wasn’t much water around but just two days prior to this interview, a storm had

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<sup>287</sup> *Id.*

<sup>288</sup> [http://kiribatikeepers.wix.com/home#!about\\_us/cjg9](http://kiribatikeepers.wix.com/home#!about_us/cjg9) (last visited Jun. 21, 2016).

<sup>289</sup> *Id.*

<sup>290</sup> <http://kiribatikeepers.causevox.com/>(last visited Jun. 21, 2016).

hit the island and there was some flooding around the island.<sup>291</sup>

Mike Roman is a former US Peace Corps volunteer to Kiribati, and an “adopted” Ikiribati citizen and climate change activist for Kiribati.<sup>292</sup> I met Michael through a social media community on Facebook that he administers, called “Humans of Kiribati”.<sup>293</sup> Humans of Kiribati came into existence in 2015. Mike was “adopted” by an Ikiribati family on his first trip to Kiribati as a Peace Corps volunteer in 2000. Michael got a fellowship to go back to Kiribati and conduct research for his Master’s in applied medical anthropology as part of the UN HIV/AIDS program. While he was working on his Master’s, he realized the more impending problem for Kiribati was the impact of climate change which led him to pursue a second Masters’ on the health implications of climate change on the island populations and a PhD on the future of the people- their culture, language- once they leave their land as a result of climate change impacts.

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<sup>291</sup> Interview with Kaeruru (Lulu) DeBoar, filmmaker and I-Kiribati climate change activist (Mar. 10, 2016).

<sup>292</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>293</sup> Humans of Kiribati, available at <https://www.facebook.com/humanofkiribati/>, (Last visited Mar. 19, 2016.)

## ii. Vulnerability to Climate Change

For Kiribati and other low lying nations, the severe impacts of climate change are not an event in some distant future but rather are happening right now and require immediate action.<sup>294</sup>

The vulnerabilities experienced are a combination of physical, and socioeconomic. Kiribati is physically vulnerable to meteorological and hydrological environmental harms. This is because of its geography. Kiribati is composed of low lying and narrow atolls. The islands are prone to flooding caused by the “King Tides”- tides of large magnitude that occur when the earth, sun and moon are in perfect alignment, which gives the impression that the ocean is slowly encroaching on the land.<sup>295</sup> When the tides come in and wash over the land, it causes coastal erosion and salination, kills vegetation and depletes fresh water sources.

Traditionally, Kiribati men are fishermen. They go out to the ocean and catch fish and sharks, they dive the reefs for shell fish, lobsters, while women grow food on the land.<sup>296</sup> The impacts of climate change however are making it increasingly difficult to sustain this type of livelihood.<sup>297</sup> The reefs do not have as many resources as they used to and the ability of the people to collect coconuts and grow taro roots has been

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<sup>294</sup> Interview with Ross Maitinnara, I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 10, 2016).

<sup>295</sup> On the day that I was interviewing Michael Roman, he mentioned that at that very moment, the Maldives were experiencing flooding as a result of a king tide. Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>296</sup> There is more reliance on imported food items (tinned items) nowadays, says Mike. Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>297</sup> *Id.*

severely limited.

When talking about the impacts of climate change that they have witnessed, this is what my interviewees had to say. Ross remembers going back to Kiribati last year (it had been 15 years since he left) and he says, “[Kiribati] was very different. I remember when I was growing up there were areas that used to be lush with trees- coconut trees and all kinds of trees, but now, you see few. [] Kiribati has no waterfalls; the only source of fresh water is from the wells that we dug from the ground. When I was growing up we used to be able to get fresh water from the well, but now when I went back, you couldn’t get fresh water- it was salty”<sup>298</sup>

Mike on the other hand remembers his first couple of years in Kiribati.<sup>299</sup> He says, he was able to see firsthand the effects of global warming on the islands. There was a lot of doubt in the early 2000s about the reality of global warming, but at some point, people started to notice that there was something that wasn’t quite right with the environment. He recalls writing a letter to his American family, expressing his worry about how global warming was going to destroy this country.

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<sup>298</sup> Interview with Ross Maitinnara, I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers), (Mar. 10, 2016).

<sup>299</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

### iii. Adaptation Strategies

*“And so I have been looking at floating islands. The Japanese are interested in building floating islands. But, as a country, we have made a commitment that no matter what happens, we will try as much as possible to stay and continue to exist as a nation.”<sup>300</sup>*

*Former president of Kiribati Anote Tong*

Those are the adaptation strategies that have been tried and are still being tried in Kiribati. Since 2005, the people started building sea walls along the ocean, the places that are closest to their homes and wherever they could. The sea walls are not always effective though.<sup>301</sup> People are in constant struggle with the tide. Every time there is a tide, they have to build a sea wall, with sand bags.<sup>302</sup> The resources that are needed to build the sea walls are quite high. So, the people’s piecemeal efforts to adapt to the encroaching sea are not strong enough to withstand the force of the tides.

Another adaptation strategy used is migrating inland. Whenever the ocean gets closer, people move inland. Out migration is one of the major adaptation techniques that the Kiribati government is pushing for. The former president has even talked about buying some land on Fiji for the people to be able to move, if the time comes<sup>303</sup>. Mike

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<sup>300</sup> Former president of Kiribati, Anote Tong, TED talk, [https://www.ted.com/talks/anote\\_tong\\_my\\_country\\_will\\_be\\_underwater\\_soon\\_unless\\_we\\_work\\_together/transcript?language=en#t-386120](https://www.ted.com/talks/anote_tong_my_country_will_be_underwater_soon_unless_we_work_together/transcript?language=en#t-386120), last (Last visited Mar. 19, 2016). The most interesting adaptation strategy I have heard about from my interview with Lulu is the idea of floating islands.

<sup>301</sup> Interview with Kaeruru (Lulu) DeBoar, filmmaker and I-Kiribati climate change activist (Mar. 10, 2016).

<sup>302</sup> *Id.*

<sup>303</sup> Mike says, “He purchased the land when I was defending my dissertation, 2013- around that period. It was bought from a church. There’s so much controversy about that land. From what I know, on that land are displaced migrants from the Solomon Islands, so it’s kind of the same story. You’re looking at

remembers when he interviewed the former president of Kiribati Anote Tong in 2007, the president told him that he expects him to take his Kiribati family if and when the time comes for the Kiribati people to leave. In the same vein, the former president has also encouraged I-Kiribati living in the Diaspora to help their families in Kiribati to move to safe places abroad.<sup>304</sup>

The former president of Kiribati has famously stated that they want to begin migration now and do it slowly, in small numbers, over long periods of time, rather than waiting for the islands to become completely uninhabitable.<sup>305</sup> Moreover, because many Kiribati people travel to New Zealand and Australia for work, it seems like there is a favorable attitude towards it.<sup>306</sup> But this positive attitude does not seem to extend to the idea of a permanent migration. Migration is not the preferred adaptation strategy. Migration involves leaving one's history behind. But for the Ikiribati, it is even more than that.

In the words of Mike,

“There is a concept that you need to understand and that the world needs to understand. They don't get it here in the US, you rent an apartment, you buy a house, and you go where your job is, where your school is. In Kiribati it's becoming like that

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a piece of land that is currently housing displaced persons for future use.”

<sup>304</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>305</sup> President Anote Tong in D. Wilson, 'Climate Change: Nobody is Immune' (*Islands Business*, 2008)

[http://www.islandsbusiness.com/islands\\_business/index\\_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=18087/overrideSkinName=issueArticle-full.tpl](http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=18087/overrideSkinName=issueArticle-full.tpl) (Last visited Mar. 19, 2016).

<sup>306</sup> In 2010, Michael traveled with his I-Kiribati family to New Zealand and worked alongside them in the farms, and in packing houses. This is typical of many Ikiribati.

[nowadays], but originally it worked this way. You are born on a land, you live there and you die there. You are buried there so that you can watch over the future generation of your family; your ancestors watch over the current generations. Thus you were the land and the land was you.”<sup>307</sup>

Asking for asylum in another country is also not a generally accepted avenue as people have very strong ties with their land and a deep connection with each other and with ocean. When the story of the Ioane Teitiota case was broadcast in the news, there were negative attitudes about it as this was seen as disrespect to the people and the nation of Kiribati. “Land is an integral element of the Kiribati identity,” says Mike. “In Kiribati, we have one word “Aba”- means land, people, and country. It’s all cosmologically tied together. [...] If you look at humans of Kiribati, we have a story about old men [...], and he says the ocean is getting closer and I want to die and be buried in that land too, even if my body goes into the ocean.”<sup>308</sup>

In addition to that Kiribati are deeply religious and they have a strong faith that God will not destroy their land completely.<sup>309</sup> Michael remembers in the early 2000s, conversations whose gist was that “God promised to never to flood the earth again: [He] made a promise to Noah and that rainbow shines all the time and it shows God will never flood the earth again. So [some] don’t believe [they]’re in trouble because God promised this to [them].” This faith is still strong and rampant in Kiribati that God will not flood the earth.

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<sup>307</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

The actors who are working to bring about change constitute a consortium of grassroots organizations, government, and NGOs, with the former president taking up the islands' cause at regional and international levels. Grassroots efforts involve going to villages, telling people about climate change.<sup>310</sup>

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<sup>310</sup> At the regional level, Kiribati cooperates with the Alliance of Small Island States (AOSIS) to address development concerns and vulnerability to the effects of climate change. *See* <http://aosis.org/about/>. (Last visited Mar. 22, 2016). Many NGOs and NPOs are major actors too (e.g. Displacement Solutions and Kiribati Keepers). International cooperation needs to understand the capacities of these nations in order to be effective.

#### **4. Conclusion**

This chapter has attempted to show the face of climate change in three different places around the world. What I found, based on these micro studies is that climate change and its impacts are being felt differently across the world. Even though all three case studies show that climate change is a major concern for all three, for small island developing states, it is the issue at the center of their very existence. For this reason, there are many mobilizations of social and political networks around climate change. The Eritrean case study on the other hand showed that transboundary movement only occurred because of the interplay between the impact of climate change (drought) and other reasons, including dictatorship, forced conscription, etc. The study shows that if the other reasons were not present, or if the people had more trust in the government, the movement would have been internal, rather than transboundary.

## CHAPTER 4

### **TWISTING THE OLD: CREATIVE INTERPRETATION OF EXISTING LAW IN RESPONSE TO CLIMATE CHANGE INDUCED MIGRATION**

As we have seen from the earlier chapters, CCIM is a real problem that affects all of humanity. This chapter investigates the legal challenge, namely, the place of CCIM in currently existing legal regimes at the international level and also the evolving jurisprudence on CCIM in the domestic courts of New Zealand and Australia.

An examination of the texts of climate change law and refugee law instruments at the international level reveals that they do not explicitly mention CCIM. The instruments examined include regional as well as international laws on the protection of human rights, refugee rights and those on climate change and environmental protection. The United Nations Framework Convention on Climate Change<sup>311</sup>, the Refugee Convention, basic human rights instruments that are of some relevance in the context of climate change induced migration.<sup>312</sup> The human rights instruments that are examined include the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, International Covenant on Socioeconomic and Cultural Rights.<sup>313</sup> Environmental instruments are also examined, with a particular

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<sup>311</sup> United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107. And Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

<sup>312</sup> The Geneva Convention Relating to the Status of Refugees, (1951), available at <http://www.unhcr.org/en-us/1951-refugee-convention.html> (last visited Jul. 14, 2016).

<sup>313</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), available at <http://www.un.org/en/universal-declaration-human-rights/> (last visited Jul. 14, 2016); 1966 International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967), available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (last visited Jul. 14, 2016); UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at,

focus on those that deal with climate change.

That is not surprising as the issue has only sprung up in the past couple of decades, years after the creation of the refugee regime. Clearly there is a legal gap there, but one could argue that even if it is not explicitly mentioned in these instruments, there might be a possibility for creative interpretation of the provisions contained in those instruments to provide protection for CCIM. Arguably that could be possible. However, I argue that a brief micro historical investigation of the regimes shows that their underlying conceptions of vulnerability and justice do not adequately respond to the intricacies of CCIM. As far as the place of creative interpretation goes, CCIM cases in New Zealand have produced mixed results. Whereas invoking the refugee regime has been largely unsuccessful, appealing to a court's discretion- to its humanity- has had promising results. Creative interpretation of the refugee regime was interestingly branded as requesting the court to exercise judicial activism, whereas the humanitarian plea was seen more favorably.

I am analyzing international law for the following reasons. First; the global nature of the causes and consequences of CCIM raises questions of intergenerational and intra generational justice. The causes and consequences of climate change know no human boundaries, making CCIM a problem of global justice- inequitable distribution of environmental harms and benefits globally, but also the effects of anthropogenic activities transcend time. Historic emissions are causing the climate to change at present, hence adding a temporal dimension to the climate justice debate. Secondly, the international arena has by default become the conceptual and normative paradigm on climate change related issues. Efforts to mitigate and adapt to climate change have

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<http://www.refworld.org/docid/3ae6b36c0.html> (last visited 15 July 2016).

traditionally been made at the international level and international cooperation is a large component of any meaningful adaptation or mitigation effort. In addition, international law is relevant in as far as it inspires or guides domestic immigration and asylum seeker laws. Thirdly, International law is also relevant because we're dealing with both internal and international (transboundary) movements.

## 1. The Refugee Regime<sup>314</sup>

Although studies show that CCIM occurs mostly within state borders, cross border movement because of climate change is also a possibility. In the case of cross border movement, barring the exception of humanitarian relief, the Refugee Convention is the default paradigm for requesting protection from a country that one does not belong to. If within one's own country, the doctrine of state responsibility requires the state to provide protection to that individual.

### i. Refugee Vulnerability Historically Conceived

Historically, vulnerability linked to refugee protection was conceived to be a situation that arose out of war (conflict), location (where the person seeking protection comes from originally), or action or omission by a state; either active persecution by a state or failure of a state to protect its citizens from persecution because of religion or politics. Although the reason for the persecution has varied throughout the years, the common element has been the inability to get protection from one's own state. Below, I will show this through a reiteration of the history of refugee protection.

The refugee paradigm was primarily based on states' "laissez faire attitude to fugitives crossing their borders and originally states did not make a distinction between refugees and migrants, i.e. there were relatively open and fluid borders."<sup>315</sup> The first

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<sup>314</sup> The 1951 Convention on the Status of Refugees and the 1967 Protocol are the primary instruments that make up the international regime of protection of refugees. Various regions have adopted instruments that supplement the international refugee regime. *See* The African Union Convention governing the Specific Aspects of Refugee Problems in Africa (1969); the European Union Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection; The Cartagena Declaration on Refugees (1984).

<sup>315</sup> Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 240 238-262 (2002).

refugees were members of a particular religious minority or political minority.<sup>316</sup> The term “refugee” was used in 16<sup>th</sup> century Europe to describe religious minorities and dissenters running away from persecution in France, Spain and Belgium.<sup>317</sup> The aftermath of conflicts in early 20<sup>th</sup> century caused mass-scale population displacement around Europe, which led the League of Nations to establish the First High Commissioner for Refugees.<sup>318</sup> States assumed a “serious obligation” to assist Russian, Armenian and other refugees through the first International Convention Relating to the International Status of Refugees of 1933.<sup>319</sup> In addition, the persecution of Jews in Nazi Germany created more refugees from Austria, Germany and Czechoslovakia during the period between the two world wars.<sup>320</sup> There was no interest in providing a universal definition of refugee at that time because the assumption was that the refugee problem was a matter of “temporary emergency” and linked to particular events or particular people groups.<sup>321</sup>

The United Nations Convention Relating to the Status of Refugees of July 28, 1951

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<sup>316</sup> See e.g., <http://www.huguenot.netnation.com/general/huguenot.htm>. (Last visited Mar. 25, 2016).

<sup>317</sup> See <http://www.huguenot.netnation.com/general/huguenot.htm>. (Last visited Mar. 25, 2016). In fact, the first time that the word “refugee” was used was to describe Calvinist Huguenots (French Protestants) and other religious minorities or dissenters who were fleeing religious persecution in France, Spain, Belgium and other places in Europe in 1573.

<sup>318</sup> See Rieko Karatani, *How history separated refugee and migrant regimes: In search of their institutional origins*, 17 INT. J. REFUG. LAW 517–541 521(2005). The High Commissioner under the League of Nations was created in 1921 and helped resettle millions of refugees (including those that fled Russia after the fall of the Russian Empire and). The motivating reason behind this was the desire to avoid wastage of resources resulting from the absence of a centralized coordinating body. However, many criticize its incoherence and ineffectiveness.

<sup>319</sup> Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 (2002). Others included Turks, Assyrians, Syrians, Assyro-Chaldeans and Kurds

<sup>320</sup> *Id.*

<sup>321</sup> See Karatani, *supra* note 318.

(the Geneva Convention)<sup>322</sup> was originally created with the purpose of providing protection to Europeans who were fleeing “events that give rise to protection that took place before 1951”, i.e. the aftermath of World War II.<sup>323</sup> Initially it had a time limit; however, in the post-World War II world its applicability to other geographical areas became apparent as situations requiring refugee assistance occurred in other parts of the world, which led to the expansion of the 1951 Convention via a Protocol in 1967.<sup>324</sup> This amendment to the Convention essentially eliminated the time limit requiring that the harm occur before 1951.<sup>325</sup> Although the treaty was created for a particular time period, the drafters did not intend for it to be only exclusive. This convention also assumes that there is persecution.<sup>326</sup> The modern refugee definition has moved from specific formulation of what constitutes a refugee to “a more generic formulation of the membership principle with marginalization constituting “risk of serious harm for reasons of race, religion, and nationality, membership of a particular social group or political opinion.”<sup>327</sup> The idea behind this, says Hathaway is that

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<sup>322</sup> After the League of Nations was dissolved and replaced by the UN, the United Nations’ Charter which was adopted for the purpose of resolving disputes peacefully and increasing international cooperation in addressing global crises. The establishment of the UNHCR in 1951 gave rise to the adoption of the 1951 Refugee Convention).

<sup>323</sup> See International Convention on the status of refugees (1951). See also, Erika Feller & Frances Nicholson, *Refugee Protection in International Law* (2003) <http://ebooks.cambridge.org/ref/id/CBO9780511493973>. B. S. Chimni, *International Refugee Law*, 644 (2000), <http://www.amazon.com/International-Refugee-Law-B-Chimni/dp/0761993622>.; Paul Abel, *the Convention Relating To the Status of Refugees*, 6 INT. COMP. LAW Q. 533–535 (1957).

<sup>324</sup> UNHCR, The Refugee Convention, 1951, the Travaux Préparatoires analyzed with a Commentary by Dr. Paul Weis, available at <http://www.unhcr.org/4ca34be29.html>. (last visited Mar. 25, 2016).

<sup>325</sup> *Id.*

<sup>326</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the ‘67 Protocol Relating to the Status of Refugees. (Geneva, 1992) [This handbook is viewed by national authorities as an authoritative guide although not formally binding with respect to refugee status/ asylum determinations] The handbook specifies that persecution is either “imposed by the state or agents of persecution that the state is unable or unwilling to control.”

“persons affected by these forms of sociopolitical disenfranchisement were less likely to be in a position to seek effective assistance within the state”.<sup>328</sup> Recommendation E of the Final Act indicates that the drafters intended for it to have an exemplary value and that “all nations would be guided by it in granting as far as possible to persons in their territory as refugees and who would not be covered by the terms of the convention the treatment for which it provides.”<sup>329</sup>

Thus historically, it is clear to see that protection granted to refugees was limited to a specific group within a particular state, and often a group that was disenfranchised by the government in power. Hathaway also explains that the first people who were protected as refugees were in some way “at odds with the power structure in their home state.”<sup>330</sup> The legitimacy of their claim rested on the fact that they did not have a say in their own governance.<sup>331</sup> Moreover, historically refugee protection was in some way linked to victimhood in a war or conflict.<sup>332</sup>

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<sup>327</sup> JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 136 (2005).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> For instance, in 1946 there were millions of European refugees displaced by World War II.

ii. **The Geneva Convention on the Status of Refugees**<sup>333</sup>

At first glance the refugee paradigm seems perfect for CCIM. It is a fairly well established regime with robust institutions and widely accepted throughout the world. It was created with the understanding that refugee protection should be addressed in the context of international cooperation and burden sharing.<sup>334</sup> It operates with underlying fundamental principles, such as non-discrimination, non-penalization and *non-refoulement* and provides for “basic minimum standards” such as access to court, education, and documentation- such as travel document which is commonly known as a Nansen passport.<sup>335</sup> The idea behind the regime is to provide protection where there is serious harm to the person in the refugee’s home country.<sup>336</sup> States generally have an obligation to protect their citizens from harm, and when they fail to do so, the refugee convention applies based on status and need.<sup>337</sup>

I submit that notions of cosmopolitan justice undergird the refugee convention; it reinforces respect for human rights of individuals- on an individual level, and has underlying principles of justice- the idea of protecting the dignity of individuals and sharing the burden of people/ individuals who are harmed somewhere else in the world and protection is granted purely on the basis of the person’s humanity and not the person’s membership in a polity. However, its institutional, structural and definitional

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<sup>333</sup> UNHCR, THE 1951 REFUGEE CONVENTION.THE TRAVAUX PREPARATOIRES ANALYSED, with commentary by Dr. Paul Weis, <http://www.unhcr.org/4ca34be29.html>. (last visited Mar. 27, 2016).

<sup>334</sup> *Id.* at 4.

<sup>335</sup> Karatani, *supra* note 314.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

limitations, as well as its conception of vulnerability make it a poor choice for governing CCIM.

There have been many discussions on whether cross border human mobility because of climate change entitles someone to “environmental refugee” status.<sup>338</sup> When we look to the text of the Geneva Convention on the Status of Refugees, it provides that a refugee is a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and owing to such fear is unable or unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or owing to such fear is unwilling to return to it.”<sup>339</sup>

The UNHCR discourages the use of the term “refugees” to describe CCIM. The argument is that using terms like “climate change refugee” or “environmental refugee” could potentially undermine the international legal regime for the protection of refugees.<sup>340</sup> Docherty and Giannini criticize this narrow definition because its power to help with the CCIM situation is limited and they propose a definition for climate

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<sup>338</sup> Although the term refugee is a legal term with very specific meaning, it has been overused in the media to denote people who migrate because of climate change related environmental harms. Using terms such as “climate refugees” or “environmental refugees” has implications for moving forward both in the area of research and policy. For one thing, they are not refugees. For another, climate change is not the driver of their displacement. Rather, it is the impact it has on other factors- which affect food production systems, soil fertility, water availability and quality and structural socioeconomic conditions, e.g. access to resources, information and alternatives. These factors will tip the balance for or against migrating.

<sup>339</sup> United Nations Convention Relating to the Status of Refugees, Art. 1, Jul. 28, 1951, 189 U.N.T.S. 150.

<sup>340</sup> JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW (2012).

change refugees.<sup>341</sup> However, I would argue that the use of the refugee paradigm and the term refugees to describe people displaced by climate change is problematic for a number of reasons. Based on my own personal research, the use of the term refugees to describe CCIM is unfavorable among for e.g. the Pacific islanders that I interviewed. In 2015, there was much hype in the mass media because of the case of Ioane Teitiota, a Kiribati citizen whose asylum application had been rejected by New Zealand. When I asked what people's reactions were at the time of the verdict, the general attitude was negative, because, "you don't disrespect your people and your country like that" says Mike Roman.<sup>342</sup> The fact that he requested for asylum was seen as a claim that his state had not given him protection.<sup>343</sup> Moreover, on various occasions where coalitions of small island states convened to talk about how climate change is affecting them, they have generally been adamant in their rejection of the use of the term refugees: they argue that it undermines the dignity and worth of the people and their agency.<sup>344</sup>

Moreover, turning to the structure and text of the refugee convention itself and the transformations it has gone through over the years, i.e. the way that it has been applied through interpretation and reinterpretation, it is obvious that this convention does not open itself to generous interpretation.

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<sup>341</sup> Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide : a Proposal for a Convention on Climate Change Refugees*, 33 HARVARD ENVIRON. LAW REV. 349–403 (2009).

<sup>342</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>343</sup> *Id.*

<sup>344</sup> Karen Elizabeth McNamara & Chris Gibson, "We do not want to leave our land": Pacific ambassadors at the United Nations resist the category of "climate refugees," 40 GEOFORUM 475–483 (2009), <http://dx.doi.org/10.1016/j.geoforum.2009.03.006>.

First, there is a requirement that the person be outside of his country of origin. More often than not, as we have seen from chapters 2 and 3 climate change related movement usually occurs within the borders of one's country first.<sup>345</sup> Some transboundary movement does occur but this in itself is a function of the ability of someone to cross the border. CCIM is multifaceted as we saw in chapters 2 and 3. In the case of slow onset disasters the fact that someone is outside of their own country of origin does not make them more worthy of protection than someone who is just as affected but cannot move because of some underlying socioeconomic vulnerability.

Second, the refugee must be unable or unwilling to get protection from [one's] own country. It is this loss or failure of state protection which makes international protection necessary for refugees. This is hard to prove because as we have seen in chapter three, the country of origin may be working hard to help with adaptation efforts; it may be willing to provide assistance but may lack in resources or expertise to provide protection or assistance.<sup>346</sup> For instance in the case of Kiribati, former president Tong was really campaigning to make his people's voices heard on the international arena. Many small islands try to cooperate in their regions. However, there is some reluctance from the developed nations to assist them.<sup>347</sup>

Third, the legal status of refugees hinge on the conception of a "well-founded fear of being persecuted".<sup>348</sup> Dr. Weis, commentator of the travaux preparatoires, says "a

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<sup>345</sup> See chapter 3 on Eritrea.

<sup>346</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>347</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016); Personal interview with Lulu DeBoar; Interview with Ross Maitinnara, I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers), (Mar. 10, 2016).

<sup>348</sup> United Nations Convention Relating to the Status of Refugees, Jul. 28, 1951.

well-founded fear is a legal standard.”<sup>349</sup> The fear has to be based on reasonable grounds of persecution, i.e. objective facts- “not the frame of mind of the person concerned and there must be a reasonable possibility for the harm to occur.”<sup>350</sup>

Fourth, the applicant has the burden of proving that there was persecution. If there is persecution, then there must be a persecutor, which raises the question, who is to blame for CCIM? Who is the persecutor? If the state that the applicant comes from is actively engaged in formulating adaptation strategies, then it is not persecuting. One can think of a scenario where the state is neglecting some portion of its citizens- if they are marginalized and this causes them to be particularly vulnerable to the effects of climate change, then perhaps you could show that there was persecution. But this is very hard to come by. In the case of Eritrea for instance, as we saw in chapter three, some interviewees in the Ethiopian refugee camp talked about their crops failing and scant rainfall over the years.<sup>351</sup> The Eritrean government’s mobilization of its resources to the military and sometimes even confiscating the subsistence farmers’ yields for the sake of redistribution could arguably constitute persecution within the meaning of the word. Therefore, unless there is active engagement in exacerbating the impact of the harm ensuing from climate change or failure to avert the ramifications, it is hard to establish persecution. There needs to be an action or an omission.

McAdam argues persecution necessarily entails “violations of human rights that are sufficiently serious, either because of their inherent nature or because of repetition,

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<sup>349</sup> Grahl Madsen the status of refugees in international law vol. 1 173 (Leyden 1966); cited in, UNHCR, The Refugee Convention, 1951, the Travaux Préparatoires analyzed with a Commentary by Dr. Paul Weis, available at <http://www.unhcr.org/4ca34be29.html>. (last visited Mar. 25, 2016). Dr. Paul Weis had participated actively in preparing the 1951 convention and the 1967 protocol.

<sup>350</sup> *Id.*

<sup>351</sup> See chapter 3 on Eritrea.

which is a matter of degree and proportion.<sup>352</sup> Hathaway understands persecution as the “sustained or systemic violation of basic human rights resulting from a failure of state protection.”<sup>353</sup>

One could argue that if the degree and proportion of the state’s involvement in creating the situation that is causing the displacement is high, then the state could be seen as a persecutor. To borrow an analogy from Alex de Waal, he described this type of negligence using the context of development aid in the 1984 famine in Ethiopia, as a frame of reference, as famine crimes.<sup>354</sup> The idea is that the state through its structures and implementation of development causes famine.<sup>355</sup> De Waal categorizes “famine crimes” into four depending on degrees of “culpability” of a state: 1<sup>st</sup> degree: intentional- government’s use of hunger as a tool of extermination to annihilate “troublesome” populations;<sup>356</sup> 2<sup>nd</sup> degree, reckless- government implements policies

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<sup>352</sup> McAdam, *supra* note 340.

<sup>353</sup> Hathaway, *supra* note 327.

<sup>354</sup> Alexander de Waal, *FAMINE CRIMES* (Ind. Univ. Press 1997). Alexander De Waal described famine as a series of events, which are not just environmental but are actually political that result in making only certain groups of people or individuals vulnerable, we could conceive CCIM in the same way. Alex De Waal’s critique of the “international humanitarian”, i.e. agencies dominating famine relief in Africa is that disasters occur or are aggravated because of lack of government accountability for famines. The 1980s drought and famine of Ethiopia which claimed the lives of close to a million people and affected many more, according to De Waal is because of over emphasis of the humanitarian international on technical expertise in famine prevention and mitigation rather than the other underlying causes of a disaster- namely the failure to address underlying political issues and vulnerabilities.<sup>354</sup> De Waal points out that there is a need to study famine in its historical and political context. Famine expertise that “stops at the point where politics begins” is thus useless. De Waal argues that human rights abuses are definitely an intimate part of famine creation.<sup>354</sup> Famine crimes: cause of famine crimes is political malfeasance: disastrous agricultural policies: natural disasters, government inadequacy to respond. In addition to the right to food, freedom from famine thus also entails respect for civil and political rights.

<sup>355</sup> Famine Crimes is a term that Alexander de Waal uses to describe the situation in which famine results not solely because of environmental problems such as drought, but because of poor political choices.

<sup>356</sup> E.g. famine in Ethiopia, Darfur.

engendering famine;<sup>357</sup> 3<sup>rd</sup> degree, indifference- government has the means to respond to crisis but it does not for some reason; 4<sup>th</sup> degree, least intentional, incompetent or hopelessly corrupt governments faced with crisis created by drought or price shocks.<sup>358</sup> If one can draw analogies between CCIM and “famine crimes”, if there is clear evidence of neglect or the state using people’s particular circumstances for abuse, then perhaps, persecution by the state can be established.

Another interesting way to look at this is to think of the persecutor as the international community that has helped accelerate global warming and climate change. As seen in the earlier chapters, CCIM disproportionately impacts indigenous people and poor communities with the least adaptive capacities.<sup>359</sup> The burden of loss to livelihood and to cultural artefacts is not shared equitably across communities and countries. For instance, nomadic pastoralists living in arid or semiarid regions who did not contribute the same amount to GHG emissions as someone who lives in an industrialized region or in a major metropolitan area in a developed nation rely more on the climate for their livelihood or peoples that live in the Polar region such as the Inuit derive their sense of identity and meaning from the environment are disproportionately affected and one could arguably say that they are being “persecuted” in that way by the international community. But this is very hard to prove as there is a general reluctance to assume responsibility for current climate change trends and it would be hard to quantify. In addition, if we subscribe to the argument that the world is the persecutor, the persecuted would be asking for protection from the persecutor, which is the complete

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<sup>357</sup> Some examples include climate adaptation projects and displacement of people because of the construction of dams in Mozambique.

<sup>358</sup> Some examples include India, and Small Island developing states.

<sup>359</sup> See chapter 3 above.

“reversal of the traditional refugee regime.”<sup>360</sup>

Individual status determination regimes are problematic says Jane McAdam because the impacts of climate change are generally felt by everyone and not inherent in particular characteristics.<sup>361</sup> I would argue otherwise. The effects of climate change as we have seen earlier (see chapters 2 and 3) are not felt generally in the same way by everyone; rather some people get affected more negatively than others because of some underlying issue that interacts with the environmental harm, the way people are affected across socioeconomic political and other lines is very different. However, ultimately, although the impacts of climate change can be devastating and harmful it would be very difficult to prove that the impacts amount to persecution or that the state or the international community is the persecutor.

Fifth, the convention requires that the persecution be linked to some characteristic inherent in the applicant; race, nationality, religion, political opinion, membership in a particular social group<sup>362</sup>. The grounds listed are not the reason why people leave—they leave because they are persecuted in some way because of these grounds. The unifying elements of the grounds of refugee protection are persecution, failure of state protection, membership in a certain community. The limits of protection as per the refugee convention: ground as set in the convention is in some way linked to a

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<sup>360</sup> Jane McAdam, *The emerging New Zealand jurisprudence on climate change, disasters and displacement*, 3 *MIGR. STUD.* 131–142 (2015), <http://migration.oxfordjournals.org/cgi/doi/10.1093/migration/mnu055> (last visited Jun. 21, 2016).

<sup>361</sup> *Id.*

<sup>362</sup> This is probably because the concept was introduced at the end of the negotiations. In the travaux préparatoires, it says that this ground was included when the Swedish delegate observed that certain refugees had been persecuted because they belonged to particular social groups. *See* <http://www.unhcr.org/3d58de2da.pdf> (last visited Mar. 25, 2016).

“serious harm” connected to the claimant’s civil or political status.<sup>363</sup>

The most promising ground for protection for CCIM is arguably under “membership in a particular social group”. Because the Convention does not provide a clear definition for membership in a particular group<sup>364</sup>, courts have boldly interpreted it and expanded its scope to include very interesting categories as “social groups.”<sup>365</sup> Some of these social groups are defined across gender lines (women who are victims of domestic abuse, coercive family planning policies, female genital mutilation)<sup>366</sup>, sexual orientation (homosexuality)<sup>367</sup>, occupation (occupational groups)<sup>368</sup>, families<sup>369</sup>, tribes<sup>370</sup>, etc.

Social group, has been defined as “people who share some characteristic which

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<sup>363</sup> Hathaway, *THE LAW OF REFUGEE STATUS* (1991).

<sup>364</sup> UNHCR, *supra* note.

<sup>365</sup> This is especially true of courts in several common law jurisdictions.

<sup>366</sup> The UNHCR’s position is as follows. “Individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live may, in principle, constitute a “particular social group” within the meaning of Article 1A(2) of the 1951 Convention.” In reference to refugee women, subject to state’s discretion, they could be seen as a particular social group “if women asylum seekers face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live.” *See* Executive Committee, *Refugee Women and International Protection* (1985). For case law granting asylum based on gender based violence- FGM, *See* <http://refugeelegalaidinformation.org/fgmc-case-law-and-other-legal-documents> (last visited Jun. 21, 2016).

<sup>367</sup> *See* Janna Weßels, *Sexual orientation in Refugee Status Determination*, Working Paper Series No. 73 (2011). The first case that set the precedent that homosexuality constituted membership in a particular social group was *Matter of Toboso-Alfonso* 20 I&N Dec. 819 (BIA 1994).

<sup>368</sup> *See* *Matter of Acosta*, 19 I&N Dec. 211 at 233 (BIA 1985) available at <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2986.pdf>.

<sup>369</sup> *See* T. Alexander Aleinikoff, “*Membership in a Particular Social Group*”: *Analysis and Proposed Conclusions*, Background Paper for “Track Two” of the Global Consultations ().

<sup>370</sup> *See Id.*

distinguishes them from society at large; an unchangeable characteristic because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it.”<sup>371</sup> A “particular social group” normally comprises persons of similar background, habits or social status.<sup>372</sup> Immutability and fundamentality are concepts borrowed from the other grounds for refugee protection and the common characteristic must be different from the risk of persecution itself.<sup>373</sup> Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

Lastly, in a situation where someone’s refugee claim was rejected, the refugee convention provides a fallback- the principle against *non-refoulement*- which bans states from deporting someone to a place where the person’s life or freedom could be at risk because of one of the grounds that were listed in the convention.<sup>374</sup> One could argue that climate change can create situations where returning to one’s home is impossible, (for instance if the territory is no longer inhabitable), returning the person back home, while “knowing that there is no place of return is arguably persecution

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<sup>371</sup> See (British case) *A P Islam, Judgments - Islam ( A . P . ) v . Secretary of State for the Home Department Regina v . Immigration Appeal Tribunal and Another Ex Parte Shah ( A . P . ) ( Conjoined Appeals )*, 1–28 (1998).; See also, *Id.*

<sup>372</sup> In the Canadian case, *Attorney General v. Ward*, the court defined social groups as, groups defined by an innate or unchangeable characteristic; [gender, linguistic background, sexual orientation] (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; [human rights activists] and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

<sup>373</sup> UNHCR, KATE JASTRAM AND MARILYN ACHIRON, *REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW*, 14 143 (2001).

<sup>374</sup> The Geneva Convention Relating to the Status of Refugees, Art.33 (1951), available at <http://www.unhcr.org/en-us/1951-refugee-convention.html> (last visited Jul. 14, 2016).

within the conception of the 1951 Refugee Convention.<sup>375</sup>

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<sup>375</sup> Vikram Kolmannskog & Norwegian Refugee Council, *Climate of Displacement , Climate for Protection ?*, 28 (2008).

### iii. Litigation: The “Climate Change Refugee” Case

*“AFTER AN OCTOBER DAY in the chilly, rain-soaked fields, Teitiota plunked down on the couch in the living room of his tiny, two-bedroom stand-alone granny flat in one of Auckland’s suburbs that includes Maoris, Tongans, Samoans, and other Pacific Islanders. To Teitiota, this place represents the fulfillment of his modest dreams for his family.”*<sup>376</sup>

Kenneth Weiss

New Zealand is praised for having the “most comprehensive analysis by decision makers to date about the scope and content of protection for people escaping the impacts of climate change.”<sup>377</sup> Refugee protection claims based on non-traditional grounds for protection, i.e. outside of the explicitly stated grounds of the 1951 Convention on the Status of Refugees, are not new. Indeed, since 1995, Australian and

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<sup>376</sup> Kenneth R. Weiss, “*The Making of a Climate Refugee*”: How an unsuspecting farmworker from Kiribati became the brand ambassador of climate change—despite barely knowing what it was, story available at, <http://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/> (Last visited Mar. 25, 2016). Starting from 2013, when Mr. Teitiota’s case was first rejected, news about went viral and the media started talking about the case as the “climate refugee case”. This is not the first case; however, it is the case that has had the most media coverage. Tons of stories appeared all over the world, and sensationalized the story. The article that had the most accurate portrayal of the story was written by Kenneth Weiss, who I have had the opportunity to talk to. The story of Teitiota had brought so much attention to the Kiriabti situation. Kenneth says had traveled to New Zealand and Kiribati because Foreign Policy had asked him to write a story about Kiribati. The initial idea of the editor of Foreign Policy was to inquire into the question of how to practically move an entire nation? Kenneth says he started poking around for what we in the news business call a “fresh angle” on Kiribati and landed on the story of Teitiota and his legal battle with the New Zealand legal system to expand the definition of refugee. Kenneth Weiss is a Pulitzer award winning journalist.

<sup>377</sup> Jane McAdam, *The emerging New Zealand jurisprudence on climate change, disasters and displacement*, 3 MIGR. STUD. 131–142 (2015). available online at, <http://migration.oxfordjournals.org/cgi/doi/10.1093/migration/mnu055>. (last visited Jun. 21, 2016). Since 1995, similar cases have been entertained by Australian courts as well. 2013 onwards New Zealand has made clear its stance on the legal protection that is available.

New Zealand courts have entertained a handful of asylum cases involving environmental harm as a ground for claiming protection.<sup>378</sup> These cases have all been unsuccessful. In this section, I decided to discuss the most recent “climate refugee” case from New Zealand, (*Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*).<sup>379</sup> Although this case was not successful, the New Zealand Supreme Court’s analysis of the *Ioane Teitiota* case was very thorough and sympathetic to the plight of people who are affected by climate change in general and those from small island states in particular.<sup>380</sup>

“This was an “imperfect test case.”<sup>381</sup>

*Ioane Teitoita* is a citizen of the tropical Pacific island nation of Kiribati<sup>382</sup>. He gained international notoriety as the man who set out to change international law by requesting to be recognized as a “climate change refugee” in New Zealand. His claim was however rejected at several levels of the appeals process. Although in New Zealand courts attempt to keep private the names of the parties in immigration proceedings, *Teitiota*’s case was highly publicized by his lawyer.<sup>383</sup> *Teitiota* is from

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<sup>378</sup> These cases were by applicants from Tuvalu, Tonga, Kiribati, and Bangladesh.

<sup>379</sup> See *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*. SC 7/2015 [2015] NZSC 107 and

<sup>380</sup> *Id.*

<sup>381</sup> Personal Interview with Scott Leckie, Director and Founder, Displacement Solutions (Mar. 10, 2016).

<sup>382</sup> *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*. <http://www.refugeereseach.net/sites/default/files/Teitiota%20Article.pdf>[https://forms.justice.govt.nz/search/Documents/pdf/jdo/56/alfresco/service/api/node/content/workspace/SpacesStore/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0.pdf](https://forms.justice.govt.nz/search/Documents/pdf/jdo/56/alfresco/service/api/node/content/workspace/SpacesStore/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0.pdf), (Last visited Dec. 7, 2014, See also, <http://tvnz.co.nz/world-news/kiribati-man-denied-climate-change-asylum-in-nz-5728155>, (Last visited Dec. 8, 2013).

<sup>383</sup> Interview with Michael Kidd (Dr.), New Zealand Attorney, representative of appellant in *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* (Mar. 10,

the atoll of Tabiteuea.<sup>384</sup> In Teitiota's house- part of the sea wall was knocked out and the family compound flooded twice and Teitiota helped to rebuild it. I-Kiribati see this as a normal way of life for people near the sea.<sup>385</sup> Teitiota got a New Zealand work visa and moved from Kiribati to New Zealand along with his wife in 2007. He immediately started work as a field hand and over the years he got promoted to foreman on a vegetable farm outside of Auckland. His wife started to work as a caregiver in a nursing home and they had three children while in New Zealand. Even though the children were born in New Zealand, according to New Zealand's law they are not entitled to citizenship.

By the year 2011, Teitiota had overstayed the time limit of his work visa. He then filed an appeal to extend the term of visa and stay longer in New Zealand.<sup>386</sup> The attorney he hired, Michael Kidd<sup>387</sup> set out to challenge international law by seeking to present Teitiota as a casualty of climate change.

I thought it was interesting to get the perspective of Michael Kidd, the lawyer who brought the case to the tribunal, so I interviewed him. He says he took this case because he feels sympathetic to Teitiota. Kidd used to live in Fiji and he is married to

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2016).

<sup>384</sup> See *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* (2015). See also Kenneth Weiss, *The Making of a Climate Refugee*, available at <http://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/>; see also, *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* (2015).

<sup>385</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (*Humans of Kiribati, Kiribati Keepers*) (Mar. 9, 2016); personal interview with Lulu DeBoar.

<sup>386</sup> Interview with Michael Kidd (Dr.), New Zealand Attorney, representative of appellant in *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* (Mar. 10, 2016).

<sup>387</sup> *Id.*

a Fijian woman.<sup>388</sup> He conducted research for his Ph.D. on the Tasmanian aborigines – on what he calls “the genocide of Tasmanian aborigines.” He found out that it was not so much the shooting that took the population down to almost zero, but rather the inability of the population to support itself anymore because of how the environment had changed.<sup>389</sup> In Kidd’s opinion, what is happening now in the island states is the similar to the Tasmanian case.<sup>390</sup> People in Kiribati, they can no longer grow their own food because of lack of water. In many ways, what is happening to the Kiribati people is what happened to the Tasmanian aborigines. When some I-Kiribati people approached him five years ago, he decided to take up the case.<sup>391</sup>

Michael Kidd argued that Teitiota is unable to go back home to Kiribati because the climate change induced deluge threatens not just the whole country but also the health and safety of the whole family.<sup>392</sup> Three appeals were dismissed and Teitiota was finally deported in September 2015.<sup>393</sup>

The trial court New Zealand Immigration Protection Tribunal<sup>394</sup> agreed that the carrying capacity of South Tarawa in Kiribati has been "significantly compromised because of environmental degradation and the effects of population growth,

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<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *See* Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment (2015).

<sup>393</sup> The case of AF (Kiribati), hearing in the High Court (Teitiota 2013), New Zealand Court of Appeal (Teitiota 2014).

<sup>394</sup> AF (Kiribati] NZIPT 8800413, at 2.

urbanization, and limited infrastructure development, particularly in relation to sanitation". Sudden onset environmental disasters and slow onset environmental events are making it worse. Teitiota claimed that in the village where the applicant lived in South Tarawa, the applicant was engaged in subsistence agriculture and fishery. Because of coastal erosion and increasing intrusion of salt water onto the land during high tides<sup>395</sup> the applicant was unable to practice his livelihood and it was for this reason that he came to New Zealand.<sup>396</sup> Trying to practice subsistence agriculture and fishery with the combined pressure from over-population, and sea level rise would be really difficult if not impossible for the family. In addition to that the family house is no longer available. Even though there are lands on other islands for their families, the lands are limited in size and other family members are already using them.<sup>397</sup>

The tribunal rejected Teitiota's claim because he did not prove:

1. the possibility of serious physical harm from possible future violence linked to housing, land and property disputes,
2. his inability to grow food or obtain potable water,
3. the presence of environmental conditions [...] that could endanger his life or compromise his family's ability to continue to practice their means of "subsistence with dignity"

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<sup>395</sup> The court agreed that these changes have been observed since the year 2000.

<sup>396</sup> Although he was aware of the debate about climate change, he did not ever imagine of claiming that he was a victim of climate change and for this reason should be granted residence in New Zealand or elsewhere. *See* Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment (2015). *See also* Kenneth Weiss, The Making of a Climate Refugee, available at <http://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/>; *see also*, Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment (2015).

<sup>397</sup> *See* Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment (2015).

4. failure of the Kiribati government to take adequate steps to protect from such harm as it is able to for any convention ground.<sup>398</sup>

The tribunal tried to interpret the meaning of refugee as understood in international refugee law and adopted by New Zealand's immigration laws. The appeals court tried to determine whether there was an error in the law. The court considered the use of terminology- whether the term refugee "constitutes and incorporates those who are refugees by way of climate change and its effects". Did the lower tribunal make a mistake when using the term "sociological refugee" to distinguish what could amount to valid grounds for Mr. Teitiota to seek refugee status?

The New Zealand Immigration Act 129(1) states "A person must be recognized as a refugee in accordance with this Act if he or she is a refugee within the meaning of the UN Convention Relating to the Status of Refugees, namely within the meaning of Article 1(A)(2) of the convention. In order to determine this question, the court asked whether there is an objectively verifiable real chance of the refugee claimant being persecuted if returned to his country of nationality. The next stage in the determination of status is to ask whether there is a convention reason for the persecution. New Zealand refugee law applies the Hathaway<sup>399</sup> concept of being persecuted as "the sustained and systemic violation of core human rights demonstrative of a failure of state protection." A well-founded fear of persecution implies that there must be a real possibility of the persecution happening in contrast to a remote or speculative likelihood of the occurrence of the persecution. The court reasoned that the standard is objective and that it requires human agency in the authorship of the persecution.

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<sup>398</sup> *Id.*

<sup>399</sup> See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005)

"Refugee": is capable of encompassing persons having to flee irrespective of the cause.<sup>400</sup>

The main question that the court was faced with was whether Mr Teitiota can be considered a refugee by virtue of “his act of fleeing climate change because of the serious harm that it will do to [him] and his family and the Kiribati government's unwillingness or inability to deal with the factors instituted by climate change.”<sup>401</sup>

The court rejected the case by saying that the claim was not within the contours of the legal standard of a refugee, but rather the argument was going beyond and pushing for consideration within more of a sociological conception of a refugee.<sup>402</sup> Whereas the legal conception of a refugee requires strict adherence to the letter of the law, a sociological conception would have been more encompassing. This is broader than the legal definition of a refugee, which implies that the claim falls outside of New Zealand's refugee law, which requires a strict interpretation of the convention grounds for granting refugee status.<sup>403</sup> Resorting to a sociological definition of a refugee however would qualify them for protection. The court argued that the convention grounds assume human agency- that there was a state or non-state actor that authored the persecution of the person requesting refuge. However, the court said that this human agency requirement does not preclude the possibility that “climate change could create pathways into the refugee convention or protected person jurisdiction.”

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<sup>400</sup> See *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* (2015).

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

Who is the perpetrator of the persecution? Is it the nature? Or is it a state actor? One could argue that there is a general worldwide and indirect human agency, in that greenhouse gases were emitted by everyone and these are at the origin of rising sea levels and changing weather patterns.

The reasons why the tribunal decided against Mr. Teitiota was mainly because even though environmental degradation is severe in Kiribati, this is a general problem, faced by the population of Kiribati in general and not uniquely by Teitiota and his family.<sup>404</sup> Therefore, if everyone in Kiribati faces the same fate as Mr. Teitiota, the effect of the “persecution” was not specific enough.

By labeling him a sociological refugee, the tribunal mentioned the not so attractive economic environment of Kiribati- raising the question that many have raised about CCIM- whether they are any different from economic migrants- people seeking better economic opportunities abroad. The court was putting this as a case of an economic migrant whose economic prospects were not as good in his country of origin but these “unattractive economic prospects” do not amount to individual persecution that would allow the grant of refugee status. Moreover, they argued that repatriating him to Kiribati would not result in “sustained and systemic violation of his basic human rights such as the right to life under Article 6 of the ICCPR or the right to adequate food, clothing and housing under Article 11 of ICESCR.”<sup>405</sup> Arguing that the international community is the persecutor for not taking adequate measures to mitigate the impacts of climate change would go against the “traditional refugee paradigm”

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<sup>404</sup> *Id.*

<sup>405</sup> In a New Zealand case (Refugee Appeal No 74665: para. 89), a “real risk of starvation, ‘the right to life (Article 6 ICCPR) in conjunction with the right to adequate food (Article 11 ICESCR) has been held to amount to persecution.

which assumes that a refugee is running away from his government that is “unable or unwilling to protect” him or her from persecution.<sup>406</sup> There is no evidence that Kiribati, the country of origin of the applicant is “unwilling” to protect him- quite to the contrary, it is “doing whatever it can to mitigate the impacts of climate change and disasters.”<sup>407</sup>

The High court called the arguments unconvincing arguments and discussed what it means to be a sociological refugee.<sup>408</sup>

The Court of Appeals rejected the application for leave to appeal for refugee status because the effects of climate change make living in Kiribati hard for him and his family in May 2014.<sup>409</sup> This was an appeal from the November 26, 2013 decision of a high court in Auckland, New Zealand.<sup>410</sup> The presiding judge, Justice John Priestly had at that time upheld the original rejection by saying that the argument was “novel but misguided”. Mr. Teitiota was attempting to push for a change in immigration law and policy, however, the court decided that his claim fell short of the legal criteria,

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<sup>406</sup> McAdam 2012: 45, at 5; *see also*, Teitiota 2013: para. 55.

<sup>407</sup> Jane McAdam, *The emerging New Zealand jurisprudence on climate change, disasters and displacement*, *Migrat Stud* (2015) 3 (1): 131-142. (Oxford University Press, 2015), available at <http://migration.oxfordjournals.org/content/3/1/131.abstract> (last visited Jul. 14, 2016).

<sup>408</sup> *Id.* at 54.

<sup>409</sup> Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment. *See* <http://www.refugeereseearch.net/sites/default/files/Teitiota%20Article.pdf>, (Last visited Dec. 7, 2014).

<sup>410</sup> <http://www.refugeereseearch.net/sites/default/files/Teitiota%20Article.pdf>; *See also* <https://forms.justice.govt.nz/search/Documents/pdf/jdo/56/alfresco/service/api/node/content/workspace/SpacesStore/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0/6f4d600a-373f-4ff8-8ba1-500fb7cc94b0.pdf> (last visited Dec. 7, 2014) <http://tvnz.co.nz/world-news/kiribati-man-denied-climate-change-asylum-in-nz-5728155> (last visited Dec. 8, 2013). Recently, because of sea level rise associated with global warming and coastal erosion, some areas on the atolls have come under water. For this reason, climate scientists have been predicting that this island nation’s very existence is threatened because of the ramifications of global warming.

such as “fear of persecution or threats to his life” because upon return to Kiribati, Mr. Teiotiota would not “suffer a sustained and systemic violation of his basic human rights, such as the right to life, or the right to adequate food, clothing, and housing”.<sup>411</sup>

The Supreme Court of New Zealand finally rejected the application for leave to appeal the court of appeals decision.<sup>412</sup> The court decided that there were no questions that raise arguable elements, and that there was no serious harm and no evidence that the government of Kiribati was not doing enough for adaptation.

In Kidd’s opinion, this decision was not a failure. In his words, “the court didn’t completely throw the case out- it was a good result, I think. But unfortunately the family was deported a couple of months ago. They were all deported. They were handcuffed and deported.”<sup>413</sup>

“Is the handcuffing normal?”

“Yes, well I don’t know. It was a high profile case- precaution?”<sup>414</sup>

Indeed, the Teiotiota case has been hailed as a landmark ruling, for having at least

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<sup>411</sup><http://tvnz.co.nz/world-news/kiribati-man-denied-climate-change-asylum-in-nz-5728155>, (Last visited Dec. 8, 2013), available at [http://earthjustice.org/sites/default/files/AAC\\_PETITION\\_13-04-23a.pdf](http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf) The petition was however dismissed for lack of adequate information, raising questions about the justiciability of climate change related human rights and humanitarian claims.

<sup>412</sup> , *Ioane Teiotiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* (2015).

<sup>413</sup> Interview with Michael Kidd (Dr.), New Zealand Attorney, representative of appellant in *Ioane Teiotiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* (Mar. 10, 2016).

<sup>414</sup> *Id.*

acknowledged and made visible the impact of the impending climate crisis on population movements. Whether or not this case has set a precedent for future residency claims based on climate change remains to be seen. However, it has brought to the fore the real humanitarian crisis that is potentially faced by people living in climate change hotspots in general and in certain small island developing states in particular. If global average temperatures continue to increase as predicted, some of these islands are expected to lose much of their land.<sup>415</sup> Although the case garnered much international attention and sympathy, the way that the New Zealand politicians treated it suggested that it would not be any time soon before any major jurisprudential change occurred in this regard. At the time of deportation, New Zealand's prime minister, John Key commented that Teitiota's argument was not credible and added, "I'm sure people feel for the guy... [but] in my eyes, he's not a refugee, he's an *overstayer*".<sup>416</sup>

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<sup>415</sup> David Corlett, *STORMY WEATHER: THE CHALLENGE OF CLIMATE CHANGE AND DISPLACEMENT*, UNSW Press, 2008.

<sup>416</sup> Kiribati family 'terrified' of going home, available at <http://www.radionz.co.nz/news/national/284875/kiribati-family-'terrified'-of-going-home>. (last visited Mar. 27, 2016).

## 2. The Human Rights Regime

### i. Conceptual Framework

That human rights are rights that we enjoy by virtue of our being human has become an often repeated dictum in human rights scholarship. Vulnerability broadly conceived or as Bryan S. Turner put it “our vulnerable human nature” is intrinsically linked with certain fundamental rights; it “defines our humanity and is [...] the common basis of human rights.”<sup>417</sup> I subscribe to Caney’s human rights approach to climate change justice. His approach recognizes that human rights are based on a person’s humanity; that they are minimum standards of protection, universally applicable and have “lexical priority” over other values.<sup>418</sup> I agree with Turner that our humanity and shared vulnerability are the basis for human rights, and hence I argue that particular vulnerabilities linked to specific experiences and conditions should also give rise to particularized human rights protections.<sup>419</sup> Conceding with Turner’s argument that the ontological vulnerability and insecurity of humans is at the origin of social institutions, I argue that the human rights regime should provide protection against general and specific vulnerabilities.<sup>420</sup>

There is sufficient scholarship linking the negative impact of climate change and the enjoyment of several human rights. In 2007, representatives from the small island states The Male Declaration on Human dimension of global climate change declared

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<sup>417</sup> BRYAN S. TURNER, VULNERABILITY AND HUMAN RIGHTS 1 (2006).

<sup>418</sup> Caney *supra* note, at 165.

<sup>419</sup> Turner *supra* note 384.

<sup>420</sup> *Id.* at 26.

their concern that “climate change has clear and immediate implications for the full enjoyment of human rights including inter alia the right to life, the right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health.”<sup>421</sup>

There is also common knowledge that displacement puts people at particular vulnerability to risk. Displacement linked to disaster especially, has the potential to aggravate already perilous human rights situations, including “increases in gender-based violence in temporary shelters, discrimination in assistance and solutions, shortcomings in evacuation procedures, etc.”<sup>422</sup> As we have seen in earlier chapters, climate change is already starting to affect some of the poorest and most vulnerable communities around the world.

Thus, in this section, I look at the role of human rights and humanitarian law - treaty and custom based- as well as the role of instruments that do not necessarily fall within the sphere of hard law in addressing CCIM. I am grouping several alternative avenues for protection under the general title “human rights regime” because “miscellaneous mechanisms for protection” sounded too fluid. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political

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<sup>421</sup> In March 2008, the UN Human Rights Council requested a handful of organizations (the Office of the UN High Commissioner for Human Rights and other organizations, IPCC, UNFCCC, and “other stakeholders”) to do a detailed study on the link between climate change and human rights. The UN Human Rights Council submitted that climate change presents a “far reaching threat to people and communities around the world and implications for the full enjoyment of human rights”. It also mentions its recognition that some groups are more vulnerable to the effects than others. (It mentions low-lying small island countries low lying coastal zones, developing countries with fragile mountainous ecosystems).

<sup>422</sup> Elizabeth Ferris, *Disasters and Displacement: What We Know, What We Don't Know*, <http://www.brookings.edu/blogs/planetpolicy/posts/2014/06/09-climate-change-natural-disasters-ferris> (last visited Mar. 26, 2016).

Rights, the International Covenant on Socioeconomic and Cultural Rights, “soft law” instruments (the Guiding Principles on internally displaced persons, the Peninsula Principles)The human rights regime offers several avenues for protection by providing minimum standards for the application of both positive and negative rights.

The benefit of working within the human rights paradigm is that human rights have universal application. At least conceptually, all types of migrants and displaced persons, regardless of whether their mobility was forced or not, internal or transboundary, are indisputably under the protection of the human rights system. Bourban praises the practicality and normative appeal of a human rights approach to addressing climate change justice, which he says would help to, “locate specific climate injustices” and “advocate a moral position.”<sup>423</sup>

Enforcement however could be difficult. For one thing, from a purely positivist view of the law, states’ human rights obligations are jurisdictionally limited. The doctrine of state responsibility requires states to protect their citizens and other people living within their territory. Beyond the territory however, there is no legal obligation and there does not seem to be any appetite for accepting extra territorial responsibility.

For another, establishing responsibility for a violation of a human right could entail showing a connection between a human action and the situation resulting in a violation of human rights.<sup>424</sup> This can be very hard to prove in the case of claims involving climate change.<sup>425</sup>

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<sup>423</sup> Michel Bourban, *Climate Change , Human Rights and the Problem of Motivation*, 1 37–52 (2014).

<sup>424</sup> In displacement, the harm could be the government’s action or failure to act and not necessarily the environmental event.

<sup>425</sup> Siobháan McInerney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues*,

Another hurdle with using the human rights regime is the difficulty associated with imputing responsibility to an entity. Bourban proposes a theory of “collective responsibility” for the impacts of climate change as individual responsibility would be difficult to quantify.<sup>426</sup> Climate change, he says is an aggregative harm generating systematic human rights violations, and that consumers and producers share a responsibility.<sup>427</sup> This collective would be represented by nation-states. However, even collective responsibility is very difficult to prove.<sup>428</sup> He then tries to make a case for attributing collective responsibility to developed democratic countries, which according to Bourban, have "a compelling moral duty to develop and implement strong climate policies that lessen these injustices."<sup>429</sup> Although this idea makes sense from a cosmopolitan perspective, its effectiveness is questionable as states are generally resistant to accepting responsibility for climate change. For instance in 2005, the Inter-American Commission for Human Rights asked this very question - how can you impute liability on a state when others have contributed to the harm as well? The other problem that his approach could encounter is the question of whether the present generation in the developed countries should be responsible for the actions of the past generation that largely contributed to the current change in climate. If so, how do we quantify it? One could also ask whether it is fair to impute liability retroactively for actions that were not illegal at the time that the actions took place. In this case, climate

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33 HARVARD ENVIRON. LAW REV. 431–439 (2009). She asks the very same question of how you can connect the physical manifestations of climate change with people’s entitlements to certain rights and freedoms and the responsibilities of states, but does not offer any response.

<sup>426</sup> Bourban, *supra* note 423.

<sup>427</sup> *Id.*

<sup>428</sup> See the Inuit Circumpolar Conference case in the next section.

<sup>429</sup> *Id.* at 42.

change is the result of current and past emissions. How can we “punish” the collective for their actions (GHG emissions) which were legal at the time that they occurred? There were no emissions targets prior to the climate regime’s conception and development in the 1990s.<sup>430</sup> Some other critiques of the human rights approach were made by Stephen Gardiner who says that a human rights approach does not provide a full ethical response because it leaves out damage to nature and it is too victim centered.<sup>431</sup> However, this is irrelevant to the discussion at hand on CCIM and human displacement.

Notwithstanding the above mentioned drawbacks of using human rights, there is no denial that climate change puts rights at risk and I agree with Caney that a human rights centered analysis has far reaching consequences for understanding the kind of action that should be taken.”<sup>432</sup> Caney’s two fold justification for human rights- intrinsic and instrumental- offers a good starting point.<sup>433</sup> The intrinsic justification for human rights is grounded in the idea of respect for persons, while the instrumental (deontological) justification says that human rights should be justified in terms of their consequences for people's lives.

## **ii. Relevant Human Rights Principles**

Here, I discuss human rights and freedoms that are in some way linked to CCIM and the rights that are affected by climate change in general. Fundamental human rights

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<sup>430</sup> Stephen Gardiner, *Human rights in a holistic climate in human rights: the hard questions*, eds. Cindy Holder and David Reidy (2013).

<sup>431</sup> *Id.*

<sup>432</sup> Caney, *supra* note.

<sup>433</sup> He borrows this from Thomas Nagel’s theory of human rights.

that could be jeopardized by global climate change include, right to life, liberty and security of the person<sup>434</sup>, protection from cruel, inhuman or degrading treatment or punishment<sup>435</sup>, the right to a standard of living adequate for the health and wellbeing of a person, to social services and security.<sup>436</sup> Bourban's analysis is based on two positive rights: right to health and right to subsistence, i.e. the right to not be deprived of one's means of subsistence by other people's actions.<sup>437</sup> Subsistence farming and

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<sup>434</sup> Article three of the UDHR states, "everyone has the right to life, liberty and security of person." See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), available at, <http://www.un.org/en/universal-declaration-human-rights/> (last visited Jul. 14, 2016).

Article 6(1) ICCPR Every human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily deprived of his life. See International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967), available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (last visited Jul. 14, 2016).

<sup>435</sup> Article seven of ICCPR no one shall be subjected to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. See International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967), available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (last visited Jul. 14, 2016).

<sup>436</sup> Article 25(1) of UDHR everyone has the right to a standard of living adequate for the health and well-being of himself, of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. See UDHR, *Supra* note 434, art 25(1).

Article 22 of UDHR "everyone as a member of society has the right to social security and is entitled to realization through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and free development of his personality. See UDHR, *Supra* note 434, art 22.

Article 11(1) of the ICSECR also provides that the responsibility of the states parties to the covenant to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions" and that "the states parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent." Moreover, states parties have the responsibility to "take individually and through international cooperation the measures including specific programs which are needed." See UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, art. 11(1), available at, <http://www.refworld.org/docid/3ae6b36c0.html> (last visited Jul. 14, 2016).

<sup>437</sup> See TUULA HONKONEN & ED COUZENS, INTERNATIONAL ENVIRONMENTAL LAW-MAKING AND DIPLOMACY REVIEW 2011 (2013).

pastoralism are two means of subsistence that are severely affected by climate change. Right to health- right not to have one's health seriously affected - malnutrition, diseases that spread.<sup>438</sup>

**Statelessness:** The right to a nationality<sup>439</sup> is relevant to the CCIM discourse particularly in the context of low lying islands which are mostly located in the Pacific, which many are saying could be at risk of losing entire territories of the state. In such an event of total territory loss, what would happen to the state and what would happen to the citizens of the state?<sup>440</sup>

**Freedom of Movement:** This is a fundamental human right provided for by the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (ICCPR).<sup>441</sup> These instruments provide for freedom of movement to individuals although they do not specify what conditions would warrant such a freedom. The rights are subject to law imposed restrictions and restrictions that are necessary to protect national security, public order, public health or morals, the rights or freedoms of others, and must be consistent with the other rights recognized in the

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<sup>438</sup> This idea ties back to the conceptual discussion in chapter 2.

<sup>439</sup> Article 1 of the ICSECR states that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. " See UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, art. 1, available at, <http://www.refworld.org/docid/3ae6b36c0.html> (last visited Jul. 14, 2016).

<sup>440</sup> Article 15(1) of the UDHR states, "everyone has the right to a nationality and 15(2) no one shall be arbitrarily deprived of his nationality or denied the right to change his nationality. See UDHR, *Supra* note 434, art 15(1).

<sup>441</sup> Article 13(1) of the UDHR states, "everyone has the right to freedom of movement and residence within the borders of each country. Article 13(2), "everyone has the right to leave any country, including his own, and to return to his country. Article 12 (1) ICCPR everyone lawfully within the territory of a State shall within that territory, have the right to liberty of movement and freedom to choose his residence. *Id.* art 13(1).

ICCPR. Moreover, although this freedom allows everyone to leave any country, including his own, it does not necessarily include the freedom to enter another country. These human rights instruments however, could provide a normative guide for a solution. The law protects against arbitrary deprivation of the right to enter into one's own country.<sup>442</sup> Article 13 of ICCPR protects foreigners who are lawfully in the territory of a state party from arbitrary expulsions and deportations.<sup>443</sup>

***Right to Request Asylum or Refugee Status:*** In addition to the freedom of movement the UDHR and ICCPR grant the right to seek asylum from persecution. These instruments do not provide details on what constitutes persecution, however.<sup>444</sup>

*Principle of Non-refoulement* is a well-established principle in international human rights, preventing governments from sending an individual to a place where his life would be in danger. Non refoulement is a principle that exists in both the human rights law regime and refugee law regime. Jane McAdam and Ben Saul state that “*non refoulement* under treaty or customary international law encompasses non return to persecution, arbitrary deprivation of life, torture, cruel, inhumane or degrading treatment or punishment.” In order to “invoke” the principle of *non-refoulement*

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<sup>442</sup> International Covenant on Civil and Political Rights (ICCPR), art. 12(4), 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967), available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (last visited Jul. 14, 2016).

<sup>443</sup> *Id.* art 13. Article 13 states “an alien lawfully in the territory of a state party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by and be represented for the purpose before, the competent authority or the person or persons especially designated by the competent authority.”

<sup>444</sup> Article 14 of the UDHR on the right to seek asylum states in 14(1), “everyone has the right to seek and enjoy in other countries asylum from persecution” 14(2) limits this right by saying, “this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. UDHR, *Supra* note 440, art. 14.

however, “one needs to be outside his country.”<sup>445</sup> Unless there is a new jurisprudential development in international law, the repercussions of climate change as of now do not amount to harm that could fall under this principle.

**a. The role of Soft law instruments**

In addition to the overarching human rights system, there are certain soft law instruments that have gained much success in terms of being used by states.

For instance the Guiding Principles on Internal Displacement provide protection in the case of internal displacement. Although the principles are embodied in a soft law instrument and hence not legally binding, the Guidelines have been widely accepted as standards for the treatment of internally displaced persons. People who end up being displaced within the borders of their own country can be protected via these guidelines. However, the minute they cross the border into a neighboring country, the guidelines cease to apply. Disaster risk reduction and disaster are not included in the guiding principles, even though there is clear evidence of the potential of disasters to create displacement.

In recent years, non-state actors have been playing quite a significant role in international law making. This is true in the case of Displacement Solutions,<sup>446</sup> an entity that is actively engaged in several countries where internal displacement because of the impacts of climate change is a big issue. The NGO has teams and partners in Kiribati, Bangladesh, Panama, the Maldives, Papua New Guinea, Tuvalu and the Solomon Islands. The Peninsula Principles were drafted by the NGO in

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<sup>445</sup> Ferris, *supra* note 422.

<sup>446</sup> See chapter five for more discussion on Displacement Solutions.

collaboration with others in an effort to move towards practical solutions. It provides a normative frame for addressing internal displacement caused by climate change.<sup>447</sup> It focuses mostly on internal displacement- and more.

Another soft law instrument, the peninsula principles; they are a human rights document specifically addressing human displacement because of climate change. Climate displacement is defined as “the movement of people within a state due to the effects of climate change, including sudden and slow-onset environmental events and processes, and climate displaced person as individuals, households or communities who are facing or experiencing climate displacement.”<sup>448</sup> The focus of the instrument is finding a fair solution for the affected person through invocation of house, property and land rights.<sup>449</sup> According to Scott Leckie, the director of the NGO, even though this is only soft law instrument, states that they have offered it to have been accepting it. Some, like Bangladesh have even incorporated it into their legal system and their action plans.

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<sup>447</sup> Displacement Solutions is an international NGO that works in several countries through its partners. It takes a human rights approach to dealing with internal displacement.

<sup>448</sup> Displacement Solutions, *The Peninsula Principles on Internal Displacement* (2013), <http://displacementsolutions.org/wp-content/uploads/FINAL-Peninsula-Principles-FINAL.pdf> (last visited Jul. 14, 2016).

<sup>449</sup> See <http://displacementsolutions.org/> (last visited Mar. 27, 2016).

**ii. Litigation at the intersection of human rights and humanitarianism- New Zealand's climate change residence case<sup>450</sup>**

**a. Case History (Background)**

This case involved a Tuvaluan family of four who applied to the New Zealand Immigration and Protection tribunal to allow the family to stay in the country. The family was fighting against a deportation decision on the ground of being unlawfully in New Zealand.<sup>451</sup> If deported, the appellants would be separated from the husband's family, all of whom live in New Zealand as either citizens or residents and with whom they have particularly close bonds. The husband and wife are in their early 30s and have been living in New Zealand since 2007 with their two children, who were born in New Zealand (aged five and three).<sup>452</sup> The applicants made two alternative claims: that they are refugees and that returning to Tuvalu would put them in danger of arbitrary deprivation of life or cruel and inhumane treatment because of lack of access to land and difficulties of finding a job for the father in Tuvalu. They also argued that because of the adverse impacts of climate change on especially the children, life in Tuvalu would be difficult - more specifically because of shortage of fresh drinking water and sea level rise. Possibly discouraged by the Kiribati case (Teitiota) the Tuvaluan family took out their claim for refugee status on the day of the hearing.<sup>453</sup>

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<sup>450</sup> Immigration and Protection Tribunal of New Zealand v. Appellants: AD (Tuvalu) Jun. 4, 2014.

<sup>451</sup> The applicants were ineligible to apply under Pacific Access Category because they were illegally in New Zealand since February 2009. They also tried to obtain a work permit but they were not successful. A three month visitor permit was given to the husband in October 2010. By February 2011, he had become unlawful again

<sup>452</sup> They came to New Zealand in 2007 with visitor visas.

<sup>453</sup> In light of the Tribunal's findings in AF (Kiribati), they acknowledged that 'there was no basis upon which [they] could be recognized as refugees' (AC (Tuvalu): para. 45). Whatever harm the family might face in Tuvalu due to the anticipated adverse effects of climate change, it did not arise by virtue

## **b. Issues and Analysis**

The tribunal accepted their claim on “discretionary” and “humanitarian” grounds.<sup>454</sup> Although there was a lot of worldwide excitement about this, the court’s decision did not mention that it recognized them as a new category of climate change refugees. The court seems to have given a lot of weight to certain other non-climate change related claims- specifically the strong family ties that they have in New Zealand. To avoid confusion or misunderstanding, the tribunal explicitly stated that neither international human rights nor international refugee law are applicable in this case.

At the heart of the humanitarian claim was the question of whether their lives are in danger or that they were faced with ill-treatment because of the failure of the Tuvaluan government’s obligation to protect the family from the effects of climate change.<sup>455</sup> The humanitarian appeal as per the appellants' representative was that the appellants would be deprived of their ability to have a "safe and fulfilling life" if forced back to Tuvalu because of the effects of climate change. In order for a humanitarian claim to be successful, the conditions need to be exceptional circumstances of a humanitarian nature, and this should not go against public interest.<sup>456</sup> The appellants claimed that exposure to natural disasters can “constitute a circumstance of humanitarian nature.

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of one of the factors stated in the Refugee Convention.

<sup>454</sup> AC Tuvalu, *Supra* note 450.

<sup>455</sup> New Zealand’s Immigration Act 2009 provides that a person may receive protection as ‘a refugee within the meaning of the Refugee Convention’ (Immigration Act: s. 129(1)) or ‘under the [International] Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand’ (Immigration Act: s. 131(1)). ‘Cruel treatment’ is defined for the purposes of the section as ‘cruel, inhuman, or degrading treatment or punishment’ (Immigration Act: s. 131(6)).

<sup>456</sup> Section 207 of the Act enumerates the grounds for determining a humanitarian appeal as follows: first if there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand, and second if it would not be contrary to public interest to allow the appellant to remain in New Zealand.

Temporary protection in this regard has been given by some states: in different ways and conferring different forms of relief.”<sup>457</sup>

The tribunal cited IPCC reports on current and future negative impacts of climate change on human systems, wellbeing, the enjoyment of human rights.<sup>458</sup>

However, the tribunal was more in favor of the state being responsible for protecting life in manmade disasters rather than natural hazards over which there is less control.<sup>459</sup> The tribunal noted that Tuvalu is no stranger to the effects of climate change and according to the 2007 Tuvalu National Adaptation Program of Action; the already vulnerable environment is further stressed due to population growth, increasing risk of coastal erosion, flooding and inundation, which in turn will increase the risk of water borne diseases and decrease agricultural productivity. Droughts, hurricanes, flooding because of sea level rise and storm surges which are frequent in Tuvalu should inform Tuvalu policy of protect its citizen’s lives.<sup>460</sup> However, mitigating the occurrence is beyond the country’s ability.<sup>461</sup> Even though the tribunal acknowledged the difficulties that the applicants would face, it disagreed that the difficulties rose to the level of an arbitrary deprivation of life or that the Tuvaluan government was unwilling to care for its citizens.

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<sup>457</sup> They cited the following research paper. Jane McAdam, CC, Forced Migration and Int'l law, Walter Kaelin and Nina Schrepfer, *Protecting people crossing borders in the context of climate change: Normative Gaps and possible approaches UNHCR legal and Protection Policy Research Series* (Feb., 2012) 44-46

<sup>458</sup> IPCC Working Group Two Climate Change 2014: impacts, Adaptation and Vulnerability- Summary for Policymakers (IPCC, Bonn, 2014)

<sup>459</sup> AD Kiribati, *Supra* note, para. 87

<sup>460</sup> AC Tuvalu, *Supra* note 450, para. 75.

<sup>461</sup> *Id.*

Taking all the circumstances into account, the tribunal decided that on “a cumulative basis- there are exceptional circumstances of a humanitarian nature which would make it unduly or harsh for the appellants to be removed from New Zealand.” The tribunal took into account the presence of the husband's family in New Zealand, the family’s wider integration into their community and what they considered to be the best interest of the children appellants who would be more susceptible to the effects of climate change in making its decision.<sup>462</sup> In its judgment, the tribunal noted that the applicants are “well-loved and integral members of a family that has effectively migrated to New Zealand in its entirety and that if they are deported to Tuvalu, it would result in “an unusually significant disruption [of] a dense network of family relationships spanning three generations in New Zealand.”<sup>463</sup>

As for the claim on climate change, while agreeing that general exposure to the impact of natural disasters is a matter of humanitarian concern, there is a need to show “exceptional circumstances of a humanitarian nature such that it would be unjust or unduly harsh to deport the [] appellant from New Zealand”.<sup>464</sup> The tribunal did not decide on this issue however, because it was “satisfied that by reason of the other factors that there are exceptional circumstances of a humanitarian nature.”

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<sup>462</sup> They also took into account the integration of the children. The eldest child was in first grade at that time and had “made some great relationships with peers in his class.”

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

### 3. The Climate Change Regime

The climate change regime incorporates cosmopolitan principles and ideals. This section examines current climate change law in an effort to see how CCIM fits within the regime. In particular it analyzes cosmopolitan ideals and principles that are enshrined in international environmental law in general and in climate change law in particular. Based on Ellen Key's criticism that there is a mismatch in the substantive and procedural aspects of global environmental law in that while the substantive part enshrines cosmopolitan ideals and principles, by empowering institutions such as the World Bank, it disfavors developing countries, I analyze the place of CCIM in the highly dynamic and contentious climate change regime, and particularly as it relates to developing and underdeveloped countries which as we have seen earlier are unequally burdened by the impacts of climate change.<sup>465</sup>

I seek to understand how the regime would respond to CCIM through an understanding of the underlying principles and the conception of vulnerability incorporated in the regime and through a micro history of the formation and transformation of the regime.

The United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement are the major climate change international instruments.<sup>466</sup>

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<sup>465</sup> *Id.*

<sup>466</sup> United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107. And Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998); United Nations Framework Convention on Climate Change, The Paris Climate Agreement, Dec. 15, 2015, available at <https://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf> (last visited Jul. 14, 2016).

### **i. Formation: History of the Climate Change regime**

The 1972 Stockholm Conference on Environment and Development<sup>467</sup> and the Brundtland Commission Report<sup>468</sup> laid the foundation for the environmental activities that took place in the late 1980s and early 1990s on the international plane. After the discovery of the ozone hole in the atmosphere, the international community recognized the need to act urgently in order to avoid further environmental damage. In 1992, the United Nations passed the Rio Declaration on Environment and Development<sup>469</sup>, incorporating principles such as intergenerational justice, sustainable development, the obligation not to cause transboundary environmental harm, etc. This was a shift from a focus on mitigation of environmental harm at a small scale to finding solutions for irreversible global threats such as depletion of the ozone layer in the stratosphere, loss of biodiversity and greenhouse warming.<sup>470</sup>

According to Bodansky<sup>471</sup>, the specific climate change regime developed in five stages: The foundational period: scientific concern about global warming developed; The agenda setting phase: when climate change was transformed from a scientific into

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<sup>467</sup> UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994, available at: <http://www.refworld.org/docid/3b00f1c840.html> (last visited Jul.14, 2016).

<sup>468</sup> See Report of the World Commission on Environment and Development: Our Common Future, (1987).

<sup>469</sup> Agenda 21 : Programme of Action for Sustainable Development ; Rio Declaration On Environment and Development ; Statement of Forest Principles: The Final Text of Agreements Negotiated By Governments At the United Nations Conference On Environment and Development (UNCED), 3-14 June 1992, Rio De Janeiro, Brazil. New York, NY: United Nations Dept. of Public Information, 1993.

<sup>470</sup> W.C. Clark, Usable knowledge for managing global climatic change. Stockholm, Stockholm Environment Institute (1990).

<sup>471</sup> Daniel Bodansky, The History of the Global Climate Change Regime 23-40, International Relations and Global Climate Change (2001).

a policy issue (1985-1988);<sup>472</sup> Pre-negotiation period: governments became heavily involved in the process (1988-1990);<sup>473</sup> The formal intergovernmental negotiation phase: leading to the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992;<sup>474</sup> Post agreement phase focusing on the elaboration and implementation of the UNFCCC and initiation of negotiations on additional commitments leading to the adoption of the Kyoto Protocol in 1997.<sup>475</sup>

## **ii. Underlying Principles of the UNFCCC**

### ***Sovereignty***

The preamble highlights the principle of sovereignty of states in international cooperation to address climate change.<sup>476</sup> It provides that states have the sovereign right to exploit their natural resources pursuant to their own environmental and developmental policies in accordance with the charter of the UN and the principles of international law.<sup>477</sup> This is also further reiterated in the Kyoto Protocol.<sup>478</sup> It limits sovereignty by asserting that states need to balance their sovereign rights to development with their responsibility to not harm the global atmosphere's role in regulating the climate, i.e. through reduction of GHG emissions.<sup>479</sup> The sovereign

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<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> UNFCCC, *Supra* note 466, Preamble.

<sup>477</sup> *Id.*

<sup>478</sup> *See* Kyoto Protocol *Supra* note 466 .

<sup>479</sup> *Id.*

equality of states and the voluntary acceptance of international obligations can limit the applicability of the law in question. From the perspective of environmental justice, states can refuse to carry out their responsibilities relating to sharing the harms ensuing from climate change, namely migration, by hiding behind the veil of sovereignty.

### *Elements of Cosmopolitan Justice*

Common concern of humankind goes to the very conceptual foundation of the UNFCCC.<sup>480</sup> The UNFCCC's preamble provides that change in the earth's climate and its adverse effects are a common concern of humankind.<sup>481</sup> It further reads, "concerned that human activities have been substantially increasing the atmospheric concentrations of GHGs, that the increases enhance the natural GHG effect and this will result on average in an additional warming of the earth's surface and atmosphere and may adversely affect natural ecosystems and humankind."<sup>482</sup>

This can be seen as a theoretical constraint on state sovereign right to continue to contribute to climate change.<sup>483</sup> It is unclear whether it can be applied to climate change adaptation, including migration. However, the concept does not appear to impose legal obligations beyond cooperation.<sup>484</sup>

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<sup>480</sup> Wold, *supra* note 21, at 155.

<sup>481</sup> UNFCCC *supra* note 466, Preamble.

<sup>482</sup> *Id.*

<sup>483</sup> Wold, *supra* note 21, at 155.

<sup>484</sup> *Id.*, at 156.

### ***Right to Sustainable Development***

The right to sustainable development as per the convention has been interpreted as allowing states the sovereign right to follow their own developmental path.<sup>485</sup> The provision reflected an ongoing conflict between developed and developing countries. Common but differentiated responsibilities is a concept which provides that all states have common responsibilities to protect the environment, including climate; however because of social, economic, and ecological situations, they have different responsibilities.<sup>486</sup>

This is in line with distributive environmental justice, which advocates for equitable distribution of environmental harms and benefits. At the heart of this concept is equity; implying that wealthier countries and those that have contributed more to climate change have more responsibility than poor developing countries that contributed little to climate change. It also takes into account ecological differences, such as vulnerability of certain small island states to flooding or sea level rise. Its genesis was in the Rio Earth Summit from the North-South dialogue as per Principle 7 of the Rio Declaration.<sup>487</sup>

### ***Cooperation***

In the preamble, the UNFCCC states the parties to the convention note, “that the largest share of historical and current global emissions of GHGs has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions in developing countries will grow

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<sup>485</sup> UNFCCC, Article 3.4.

<sup>486</sup> Wold, *supra* note 21, at 161.

<sup>487</sup> *Id.*

to meet their development potential.”<sup>488</sup>

The preamble also acknowledges that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.<sup>489</sup>

### Intergenerational Justice

Article 3 states that parties should protect the climate system for the benefit of present and future generations of humankind on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.<sup>490</sup> This is in line with environmental justice. Accordingly, the developed state parties should take the lead in combating climate change and the adverse effects thereof.<sup>491</sup>

The specific needs and special circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effect of climate change and especially developing country parties that would have to bear a disproportionate or abnormal burden under the convention should be given full consideration.<sup>492</sup>

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<sup>488</sup> UNFCCC, Supra note 466, Preamble.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*, Art.2

<sup>492</sup> *Id.*, Art. 3.2

### *Common but differentiated responsibilities*

The idea of “common but differentiated responsibilities” is a conceptual framework for compromise and cooperation to meet future environmental challenges.<sup>493</sup> Article 3 talks about protection on the basis of equity and in accordance with common but differentiated responsibilities. Equity could be in reference to concepts of fairness and environmental justice.<sup>494</sup> In the UNFCCC and subsequent Kyoto Protocol, it is used to justify why developed countries have to reduce their emissions more than developing countries do. It is a principle of fairness as well that present generations should not leave future generations worse off by the choices we make today as future generations are beneficiaries of our actions. Precautionary principle which determines how environmental decisions are to be made in the face of scientific uncertainty is also a principle embedded in the instrument. It calls for taking anticipatory action to avoid environmental harm before it occurs.<sup>495</sup>

Principle 15 of Rio, forbids using scientific uncertainty as a reason for postponing cost-effective measures to prevent environmental harm.<sup>496</sup> The Rio declaration does not specify the types of policies to be used except that they be cost effective.<sup>497</sup> Article 3.3 states that the parties should take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects.<sup>498</sup> Where there

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<sup>493</sup> Wold, *supra* note 21, at 162.

<sup>494</sup> *Id.* at 164.

<sup>495</sup> *Id.* at 166.

<sup>496</sup> *Id.* at 167.

<sup>497</sup> Rio Declaration, *Supra* note 469.

<sup>498</sup> *Id.* Article 3.3

are threats of serious of irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures should be cost effective as to ensure global benefits at the lowest possible cost. To achieve this, such measures should take into account different socioeconomic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of GHGs, adaptation and comprise all economic sectors.

As climate change is the cause for the displacement, one could argue that UNFCCC applies. One major drawback of working within the UNFCCC is that it mainly discusses the relationship between states and their duties towards one another rather than their duties to individuals and communities. Moreover, although it mentions adaptation, it fails to adequately provide for migratory adaptation. Hence it may not be well-equipped to propose curative measures in the event of climate change induced migration.

### **iii. Transformation of the Regime: Recent Developments and what they mean**

Migration and displacement have come to be included in recent discussions of the COPs of the UNFCCC and have been even mentioned in decision documents.<sup>499</sup> On December 12 2015, world leaders gathered in Paris for the UNFCCC COP 21 and passed the Paris Agreement.<sup>500</sup> This agreement has been hailed as a success for climate change mitigation and adaptation because it was widely adopted- 195 countries have adopted or ratified the instrument.<sup>501</sup> In addition to the commitment by

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<sup>499</sup> E.g. Decision on Adaptation adopted in Cancun in 2010 (Decision 1.CP/16 paragraph 14 (f)); and Decision on Loss and Damage adopted in Doha in 2012 (Decision 3.CP/18 paragraph 7 (a) (vi)).

<sup>500</sup> See <https://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf> (last visited Jun. 26, 2016).

<sup>501</sup> See [http://ec.europa.eu/clima/policies/international/negotiations/paris/index\\_en.htm](http://ec.europa.eu/clima/policies/international/negotiations/paris/index_en.htm) (last visited Jun. 26, 2016).

states parties to keep global warming to below 2 degrees Celsius, it was a milestone for the climate change induced migration camp as well. Migration was discussed in the reports and documents that were submitted by countries and other entities. Human mobility because of climate change was also the subject of keynote addresses, film screenings, high level side events and exhibitions at the COP. led by IOM in partnership with UNHCR, UNU, ILO and other organizations. E.g. “There Once Was an Island”, which tells the story of a small Pacific island whose very existence, ancestral land and culture are threatened by rising sea levels.

Even though the Paris Agreement did not prescribe any obligations or rights for CCIM, the Preamble of the Agreement mentions migrants as a special category that needs to be considered when taking action relating to climate change.<sup>502</sup> The Preamble states that when states parties take action to address climate change, they should ensure that they are “[respecting, promoting and considering] their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”.<sup>503</sup> Climate change induced displacement is also mentioned in the decision document of the Paris Agreement. The decision document entrusts the Executive Committee of the Warsaw International Mechanism with establishing a clearing house for risk and to create a task force to develop recommendations ‘to avert, minimize and address’ the risk of displacement because of the effects of climate change.<sup>504</sup>

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<sup>502</sup> UNFCCC Paris Agreement, *Supra* note 466, preamble.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* para 50. Paragraph 50 of the Paris Decision states loss and damage includes “integrated

Although the Paris Agreement does not contain any provisions that specifically provide protection to climate change migrants, it at least put the matter on the agenda and has emphasized the need for more research and training, developing coping tools and implementing mechanisms.

Following the Paris Agreement, the European Council for instance, issued a press release in February 2016, emphasizing the need to develop a “climate diplomacy action plan with key messages, focused around [inter alia], increasing efforts to address the nexus of climate change, natural resources, including water, prosperity, stability and migration.”<sup>505</sup> The press release also urges member states to support capacity building and risk assessments as climate change is a “multifaceted threat” with “potentially destabilizing effects including migration, food security, reliable access to resources, water and energy, spread of epidemic disease, and social and economic instability.”<sup>506</sup> In addition, the press release concedes that the connection between climate change and migration, state fragility, insecurity and resource scarcity is undisputed and emphasizes the need to identify areas where “combined risks are particularly high and where there are critical opportunities for conflict prevention and resilience, including in the context of a wider migration challenge.”<sup>507</sup> In light of the current migration crisis, the EU’s approach favors support for mitigation and

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approaches to avert, minimize, and address displacement related to the adverse impacts of climate change.” which has been described by some as a “stepping stone for climate migrants”.

<sup>505</sup> “European Council on European climate diplomacy after COP21”, (Feb. 15, 2016), Press release 59/16, Foreign affairs & international relations Environment. P. 3, <http://data.consilium.europa.eu/doc/document/ST-6061-2016-INIT/en/pdf> (last visited Jun. 26, 2016).

<sup>506</sup> *Id.*

<sup>507</sup> *Id.* at 5.

adaptation policies.<sup>508</sup>

In addition to the Paris Agreement, the Sendai Framework for Action on Disaster Risk Reduction and the Sustainable Development Goals also treat migrants as a group worthy of special attention. For e.g. the IOM has the Evacuation Guide (MEND); the Guidelines for Integrating Migration into National Adaptation Plans and on Integrating Migration into Disaster Risk Reduction Strategies; and work on planned relocation, preparedness and return.

In spite of the positive strides, the Paris Agreement has been criticized for not specifying how human mobility fits within institutional frameworks in the national or international levels, and lacking the depth to address important issues, such as the legal status of climate migrants, the rights that they have or should have which Kristin Lambert classifies into three- “the right to receive preventative assistance to avoid being displaced, the right to get support if they’re forced to flee; and the right to build, live, work and integrate in new communities if they cannot return to their homes.”<sup>509</sup>

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<sup>508</sup> *Id.*

<sup>509</sup> Kristin Lambert, *the Paris Agreement: Spotlight on Climate Migrants*, (Dec. 29, 2015), available at <https://environment.yale.edu/blog/2015/12/the-paris-agreement-spotlight-on-climate-migrants/> (last visited Jun. 26, 2016).

#### iv. Climate Change Litigation: the Inuit Case

Justiciability of climate change has generally been problematic. For instance, in 2005, Earthjustice, the Center for International Environmental Law and the Inuit Circumpolar Council brought a case before the Inter-American Court of Human Rights on behalf of 150,000 people in Northern Alaska, Canada, Greenland and Russia.<sup>510</sup> This case was hailed for being the first one to link climate change and human rights.<sup>511</sup>

The main claim was against the USA, requesting remedies because, as “the biggest emitter of greenhouse gases” the USA was responsible for the loss of their lives and livelihoods.<sup>512</sup> They argued, among other things that “climate change disproportionately affects the Inuit, threatening their lives, health, traditional land rights, personal property and livelihoods.”<sup>513</sup> They argued that according to international human rights laws and the American Declaration of the Rights and Duties of Man, they had been denied the benefits of culture, the right to use and enjoy the lands they have traditionally occupied, right to property, preservation of health, life, physical integrity, security and means of subsistence, residence, movement.<sup>514</sup> In

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<sup>510</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief for violations resulting from global warming caused by acts and omission of the US, 70 (7 Dec. 2005).

<sup>511</sup> See <http://www.ciel.org/project-update/inuit-petition-and-the-iachr/> (last visited Jun. 21, 2016).

<sup>512</sup> *Id.*

<sup>513</sup> See EJOLT, *Climate change responsibilities in polar peoples: the Inuit Case*, available at <http://www.ejolt.org/wordpress/wp-content/uploads/2015/08/FS-44.pdf>. (last visited Jun. 21, 2016); See also, Summary of the Petition to the Inter-American Commission of Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, at 5. [http://earthjustice.org/sites/default/files/AAC\\_PETITION\\_13-04-23a.pdf](http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf) (last visited Jun. 21, 2016).

<sup>514</sup> See Summary of the Petition to the Inter-American Commission of Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, at 5. [http://earthjustice.org/sites/default/files/AAC\\_PETITION\\_13-04-23a.pdf](http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf) (last visited Jun. 21, 2016).

other words the rights of the plaintiffs had been violated and continue to be violated because US failed to curb GHGs.

The claim also requested that the harm be investigated; that the US's emissions be limited and requested help from the USA in planning adaptation measures for the inevitable impacts of climate change.<sup>515</sup>

The claim tried to create a basis for liability by invoking the UNFCCC's principle of common but differentiated responsibilities to the omission or act of the US. The idea was that even if there were other states that were responsible for causing or aggravating global climate change, the US by virtue of its action- being a major emitter, omission- failing to limit GHG emission and an Annex 1 country should bear a large portion of the harm caused in climate change hotspots. The US government had negative obligation, which it ignored.

The commission said this case was inadmissible but they were willing to have a Public Hearing on March 1 2007.<sup>516</sup>

Members of the commission inquired as to how one state can be held liable for actions of others, to which the attorney for petitioner, Wagner replied, 'it's like saying if two people stab a knife into someone together we have to figure out how much each person is responsible, in order to assign liability.'<sup>517</sup> A more appropriate interpretation says Wagner is to hold the defendants responsible separately and jointly.<sup>518</sup>

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<sup>515</sup> See *Inuit Circumpolar Conference v. Bush Administration*  
[http://earthjustice.org/sites/default/files/library/legal\\_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf](http://earthjustice.org/sites/default/files/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf), (Last visited Jan. 22, 2014).

<sup>516</sup> *Climate Change and Human Rights: A Rough Guide*, International Council on Human Rights Policy (2008)

<sup>517</sup> *Id.*

<sup>518</sup> *Id.*

I argue that in the absence of direct injury, it is very difficult to establish liability because of the complex causal chains, which could undermine the justiciability of climate change related human rights and humanitarian claims is still questionable.

#### **4. Conclusion**

So far there is no law that specifically deals with climate change migrants as an explicitly protected category. Although in popular media they have been referred to as climate refugees or environmental refugees, this term is a mischaracterization as it has no legal basis. It raises questions as to who is a "refugee" and what qualifies as an impact of "climate change" that caused the displacement. A refugee as per international refugee law is a person who has a well-founded fear of being persecuted for reasons of political opinion, religion, race, nationality or membership in a social group." A climate change refugee or an environmental refugee was not envisaged by the refugee convention at the time of its drafting. International refugee law is meant to tailor the needs of a limited category of persons and it is premised on the understanding that once the reason for persecution is no longer present, the refugee will return to his/ her country of origin. In the case of climate change migrants however, the temporary or permanent nature of the relocation depends on the nature of the disaster that caused the migration in the first place. In the case of slow onset disasters which change the environment permanently for instance, the ensuing relocation could be more or less permanent; this is not in line with the mandate of the refugee convention. In addition, whereas a refugee is unable to have his /her country of origin's protection, a migrant is still under the protection of his government. Hence, I argue that expanding the scope of refugee law to include climate change refugees may not be the best solution.

Changing gears and turning to international environmental law, the UNFCCC contains provisions allowing for adaptation to climate change. CCIM is a form of adaptation as per the IPCC's report. However, this does not provide us with an adequate set of factors before we decide the definition of migrants and disaster.

## CHAPTER 5

### TO TWEAK THE OLD OR BRING IN THE NEW? DEBATES ON ADOPTING A NEW MULTILATERAL CCIM LEGAL INSTRUMENT

Having surveyed the current legal system's inadequacies in the previous chapter, I now turn to other possibilities for responding to CCIM. Since I started this research, many activities have been taking place around CCIM. It has gained recognition as a topic worthy of academic and policy discourse only in the past half-decade. Hence legal scholarship on CCIM is scant. The researcher's task is made even more difficult by its dynamic nature. If not at the international level, at the domestic and regional levels, changes have been occurring at a fast pace. A growing number of state and non-state actors are working on policy and law proposals on CCIM as awareness of the problem has increased. I look at the activities of those who advocate for rights-based protection regimes and also those who work within non-legal remedies. I categorize the proposals to innovate on the current system into three: advocating for supplementation of an existing law (refugee law? climate change law?) via protocol, adoption of a completely new standalone multilateral instrument, and an alternative combination of different strategies including soft law, policy, administrative law, etc. The chapter critically engages with the arguments for and against these three possibilities. In the second half of the chapter, I look at the practical side- the on the ground efforts of non-state and inter-state actors.

## 1. A New Treaty

In this section, I examine proposals for the adoption of a new legal instrument, both in the form of a protocol to an existing instrument and also a new standalone instrument. First I look at the scholarship on suggestions for a new instrument and later suggest the disadvantages of these approaches.

### i. The Current Legal and Policy Literature

Suggestions for a new multilateral legal instrument to deal with climate change induced migration have been advanced by several legal scholars, including Docherty and Giannini (2009), Biermann and Boas (2007), Williams (2008), and Hodgkinson et al (2008).<sup>519</sup> Although all of them agree on the inadequacy of the existing refugee and human rights regimes, they differ on the type, details and scope of the instrument to be adopted to remedy the inadequacy. Hodgkinson et al (2009) analyze the limitations of the UNFCCC and propose the adoption of a single stand-alone convention.<sup>520</sup> Biermann and Boas on the other hand reject this idea and suggest that a protocol on the recognition, protection, and resettlement of climate refugees, annexed to the UNFCCC is what is needed.<sup>521</sup> Docherty and Giannini also advocate the adoption of a

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<sup>519</sup> See David Hodgkinson et al., Copenhagen, Climate Change “Refugees” and the Need for a Global Agreement (Unpublished); David Hodgkinson et al., *The Hour When the Ship Comes In: A Convention for Persons*; Bonnie Docherty and Tyler Giannini, *Confronting a Rising Tide: a Proposal for a Convention on Climate Change Refugees*, 33 Harv. Env’tl. J. rev. 349 (2009); Frank Biermann and Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System To Protect Climate Refugees*, 10 GLOBAL ENVTL. POL. 60, 68 (2010).

Frank Biermann and Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol* (2008); Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 L. & Pol’y, 502 (2008).

<sup>520</sup> David Hodgkinson et al., Copenhagen, Climate Change “Refugees” and the Need for a Global Agreement (Unpublished).

<sup>521</sup> Biermann and Boas, *supra* note 519.

new standalone international instrument “to confront the issue of climate change refugees” and providing for both “prevention and remediation of the climate change refugee problem”.<sup>522</sup>

Koko Warner (focusing on the funding gap) asserts that policy makers need to take a holistic approach to this emerging issue which addresses both the drivers in origin areas (e.g., livelihood insecurity, environmental hazards, conflict, demographic pressures, gender inequality, etc.) and the pull factors in destinations (e.g., demand for labor, aging of the population).<sup>523</sup>

The argument for such an instrument is that “[t]he problem of CIM is sufficiently new and substantial to justify its own legal regime instead of being forced into existing frameworks”.<sup>524</sup> The proponents argue that such a convention would have underpinnings from humanitarian law, human rights law environmental and refugee law.”<sup>525</sup> The theoretical basis for responsibility is the contribution to climate change/GHG emissions. Based on the argument that humans should bear some responsibility for the displacement that results from their irresponsible actions, they suggest that the proposed definition should incorporate a “more likely than not” standard for human contribution to the disruption.<sup>526</sup>

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<sup>522</sup> Bonnie Docherty and Tyler Giannini, *Confronting a Rising Tide: a Proposal for a Convention on Climate Change Refugees*, 33 Harv. Envtl. J. rev. 349 (2009). They define climate change refugees “as people whom climate change forces to relocate across national borders.”

<sup>523</sup> Koko Warner,

<sup>524</sup> Docherty and Giannini, *Supra* note 522.

<sup>525</sup> *Id.*

<sup>526</sup> *Id.*

## ii. Terminology and Typology

Terminology more than being a matter of labeling and mere semantics, rather has implications for the type of rights exercised and the obligations of the international community towards climate change migrants under international law.<sup>527</sup>

However, there are conflicting views on what terminology to use. Even among those advocating for the adoption of a multilateral instrument, there is no consensus on the appropriate terminology to define climate change migrants.

Those subscribing to the idea that climate change migration should be treated within a “refugee” regime have proposed definitions for climate change refugees.<sup>528</sup> Biermann and Boas (2007) assert that “climate change refugees are people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea level rise, extreme weather events and drought and water scarcity.”<sup>529</sup> Docherty and Giannini also lean towards the use of climate refugees, but they emphasize on the need to define the parameters of the definition, which they say has to comprise six threshold criteria for a legally binding treaty rather than general policy.<sup>530</sup> The six elements are forced migration, temporary or permanent relocation, movement across national borders, disruption consistent with climate change, sudden

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<sup>527</sup> Oli Brown, *Migration and Climate Change*, 31 IOM INT’L ORG. FOR MIGRATION (2007).

<sup>528</sup> E.g. Bierman and Boas (2010); Docherty and Gianini (2009)

<sup>529</sup> Frank Biermann and Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol* (2008); Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 L. & Pol’y, 502 (2008).

<sup>530</sup> Docherty and Gianini, *supra* note 522.

or gradual environmental disruption, and “more likely than not” standard for human contribution to the disruption.<sup>531</sup>

It was El Hinnawi who first 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 or triggered by people) that jeopardizes their existence and/ or seriously affected the quality of their life.”<sup>532</sup> By “environmental disruption” in this definition is meant any physical, chemical and/or biological changes in the ecosystem or the resource base that render it temporarily or permanently unsuitable to support human life.”<sup>533</sup> He classified “environmental refugees” into three based on the type of relocation: those who are temporarily displaced due to drastic environmental disasters- man-made or natural, those who are permanently displaced due to drastic environmental changes, those who migrate because of gradual deterioration.<sup>534</sup> However, he did not provide generic criteria for distinguishing one type of migration from another.<sup>535</sup>

The term “refugees” is not universally accepted. For instance, McNamara and Gibson (2009) underscore the undesirability of the terms “environmental refugee” or “climate refugee”<sup>536</sup> because of the associated negative connotations of victimhood and

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<sup>531</sup> *Id.*

<sup>532</sup> ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES 4 (1985).

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

<sup>536</sup> See ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES 4 (1985); Diane C. Bates, *Environmental Refugees? Classifying Human Migration Caused by Environmental Change*, 23 POPULATION & ENV'T 465, 468 (2002); OSCE Economic Forum, Prague, May 23-27, 2005, *Environmental Refugees: An Emergent Security Issue 1*, OSCE Doc. EF.NGO/4/05 (May 22, 2005)

passivity that are ordinarily linked to the status of a “refugee”.<sup>537</sup> Kolmannskog (2008) also denounces the use of the term “refugee” to climate change migrants, asserting that it could undermine the Refugee Convention’s mandate and dilute the quality of protection given.<sup>538</sup>

Hodgkinson et al (A research team from the University of Western Australia) prefer the use of the word “climate change displaced persons”. Beneficiaries of instrument: people who are forced to move, regardless of whether they relocate temporarily or permanently, due to sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed.<sup>539</sup> Moreover, they advocate the use of targeted regional measures through the adoption of multilateral and bilateral instruments.<sup>540</sup> Hodgkinson et al’s model, emphasizing the use of localized responses in addition to the multilateral regime and a broader category of CCDPs ensures a more comprehensive and effective response.<sup>541</sup>

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[http://www.osce.org/documents/eea/2005/05/14488\\_en.pdf](http://www.osce.org/documents/eea/2005/05/14488_en.pdf) (last visited June 21, 2016).

<sup>537</sup> Karen Elizabeth McNamara and Chris Gibson, *We Do Not Want to Leave Our Land: Pacific Ambassadors at the United Nations Resist the Category of Climate Change*, 40 GEOFORUM, 475-483 (2009), available at [www.elsevier.com/locate/geoforum](http://www.elsevier.com/locate/geoforum). Also available at [https://www.researchgate.net/publication/221948968\\_'We\\_do\\_not\\_want\\_to\\_leave\\_our\\_land'\\_Pacific\\_ambassadors\\_at\\_the\\_United\\_Nations\\_resist\\_the\\_category\\_of\\_'climate\\_refugees'](https://www.researchgate.net/publication/221948968_'We_do_not_want_to_leave_our_land'_Pacific_ambassadors_at_the_United_Nations_resist_the_category_of_'climate_refugees') (last visited They state that ambassadors from small island states which are vulnerable to climate change migration reject the use of the terminology).

<sup>538</sup> Vikram Kolmannskog, *Climate of Displacement, Climate for Protection?* (Dec. 2008). [http://www.diis.dk/graphics/Publications/Briefs2008/B08-12\\_Climate\\_of\\_Displacement%282%29.pdf](http://www.diis.dk/graphics/Publications/Briefs2008/B08-12_Climate_of_Displacement%282%29.pdf)

<sup>539</sup> Like the other definitions, this proposal consists of six main elements that can be divided by their focus on the character of the migration or the character of the environmental harm. It circumscribes the character of the migration according to existing refugee law by specifically limiting climate change refugees in the nature of their move-

<sup>540</sup> Hodgkinson et al, *Supra* note 519.

<sup>541</sup> *Id.*

The answers to the question what type of reason qualifies as a disaster, and what type of movement qualifies for protection: forced or voluntary, temporary or permanent, internal or trans-boundary, slow onset or sudden onset environmental disruption? The definitions of the rights holders also provide some description of the typologies of climate change disasters that should warrant protection. In Biermann and Boas' definition of climate change refugees, the reason for movement generating rights must be "sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea level rise, extreme weather events and drought and water scarcity."<sup>542</sup> However this definition does not make distinctions based on the character of the migration and proscribes the same standard of protection regardless of the forced or voluntary, permanent or temporary, internal or trans-boundary nature of the migration. Their limitation of the types of environmental changes causing migration is simplistic and does not leave room for scientific discovery. Docherty and Giannini (2009) however, adopt a broader definition covering internal, trans-boundary, temporary and permanent migration caused by both sudden and gradual disruptions.<sup>543</sup> With regard to the underlying cause, they subscribe to the position that the convention should not cover all environmental degradations but only those that are consistent with climate change.<sup>544</sup>

Docherty and Giannini (2009) also emphasize that definition should require a nexus between the environmental disruption and human action.<sup>545</sup> Based on the argument

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<sup>542</sup> Biermann and Boas, *supra* note 529.

<sup>543</sup> Bonnie Docherty and Tyler Giannini, *Confronting a Rising Tide: a Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. J.L. REV. 349 (2009).

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

that humans should bear some responsibility for the displacement that results from their irresponsible actions, they suggest that the proposed definition should incorporate a “more likely than not” standard for human contribution to the disruption.<sup>546</sup> This causal requirement shifts the focus of the need to provide protection and humanitarian assistance to victims. Although addressing the issue of accountability through the principle of common but differentiated responsibilities, proving a nexus between these two should not be an issue. Docherty and Giannini’s broad definition covers internal, trans-boundary, temporary and permanent migration caused by both sudden and gradual disruptions.<sup>547</sup> With regard to the underlying cause, they subscribe to the position that the convention should not cover all environmental degradations but only those that are consistent with climate change.<sup>548</sup>

Walter Kaelin (former representative of the UN secretary general on the human rights of internally displaced persons offers five-fold typology of the situations that may give rise climate change induced displacement: sudden onset disasters such as flooding, slow onset environmental degradation due, for example, to sea level rise, “droughts and desertification”, so called sinking small island states, governmental designation of areas as high risk zones too dangerous for human habitation and, unrest seriously disturbing public order, violence or even armed including conflict due to resource scarcity.

In terms of focus whereas the Refugee regime puts a lot of emphasis on the persecutor- on this idea that there must be an active or passive agent that caused the

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<sup>546</sup> *Id.*

<sup>547</sup> *Id.* at 349.

<sup>548</sup> *Id.*

harm, the adoption of a new treaty could focus on the harm that is suffered rather than the one that caused the harm.

### **iii. Drawbacks**

Although I agree that a multilateral international legal instrument can serve as a binding normative framework ensuring universal application and global agreement on important issue, there are several difficulties associated with adopting a new legal instrument.

#### ***b. Procedural: Lack of political will***

First, states are afraid to take on new legal obligations. The people working on the ground on CCIM that I have talked to, all agree that so far there has been very little interest in assuming new legally binding obligations on the part of the state. There is generally a lack of political will on the part of states to adopt legally binding instruments and assume obligation. Naturally, states would be more favorable of a protocol to an already well established legal instrument, which has acquired widespread acceptance, and suspicious of a completely new one.

#### ***c. Causation***

The other reason why a new instrument would not be a viable option is due to the difficulty associated with conceptualization of causation, as the multi-causal nature of CCIM does not lend itself to concrete lawmaking. As we saw earlier, it is very difficult, if not impossible to link displacement to climate change. We could also run into the difficulty of quantifying the degree of compulsion that is experienced across the different types of disasters and movements.

As was discussed in chapters 2 and illustrated in the case studies in chapter 3, socioeconomic factors as well as geophysical and environmental factors determine the cause and consequences of CCIM. A disaster is not merely a physical phenomenon but one which results from the interaction of the physical manifestation of an environmental degradation and socioeconomic conditions. Whether or not a certain physical condition will result in a disaster depends on a number of interrelated issues determining vulnerability. Hence, it is not always obvious that movement is caused by climate change. Usually climate change compounds already existing stresses, such as political, economic challenges. For instance in East Africa, Somalis move into neighboring countries because of environmental catastrophes- drought as well as political problems, such as the war. So how do we distinguish between people that are being forced to move as a result of an event that is purely the effect of climate change and those that have a choice to make a decision, i.e. how do we distinguish these people from economic migrants who are moving because of an environmental event? In the case of sudden onset disaster, such as hurricanes or severe storms, or cyclones, it is easier to see the immediate link. In the case of slow onset disasters however, the link is not that clear. Therefore, it would be hard to codify this into law.

Moreover, it is not easy, as we saw in the earlier section to find a term to describe the category of persons in need of protection. Are they refugees, displaced persons or migrants? The answer to this question depends on the degree of control and agency that the affected individuals exercised on the decision. Whereas the term migrant implies a conscious and voluntary decision to move, the terms refugee and displaced person indicate compulsion and a lack of agency or control in the decision. This is tricky in climate change induced migration because of the nature of the different types of triggers of movement. Whereas in the case of sudden onset disasters that alter the

area completely so that it becomes inhabitable or even dangerous to live in, in order to survive individuals or communities have no other choice but to move. In this sense they have no agency. The compulsion indicates that the movement is involuntary or forced. On the other hand, in the case of a slow onset disaster, it is possible that the movement is a product of a conscious decision to relocate after observing the unfolding of the conditions that give rise to the disaster. The distinction made between voluntary “migrants” and “refugees” could offer theoretical justifications for who should be entitled as a matter of necessity to stay in a certain place on a permanent basis.<sup>549</sup> The degree of control that the affected persons exercise is also to some extent dependent on the nature of the trigger of the movement. For instance in the case of sudden onset disasters, the only survival strategy could be relocation. In real life however, the decision to move is a function of several factors which are not neatly in one of the two categories described above. The degree of compulsion to move is rather on a spectrum which renders the decision to move more complicated than the binary description provided above. The nature of the trigger of movement and the intensity and duration of the trigger as well as the preexisting vulnerabilities are all important factors that determine the degree of compulsion to move.

Diane Bates develops a classification that attempts to differentiate “environmental refugees” from other refugees or migrants and asks whether all “environmental refugees” are alike?<sup>550</sup> Although they may have considerable control over the decision

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<sup>549</sup>Diane Bates, *Environmental Refugees, Classifying Human Migrations Caused by Environmental Change*, Sam Houston University (2002).

<sup>550</sup> *Id.*

Bates identifies three types of environmental disruptions that would cause migration of populations: [sudden] disasters, expropriation and gradual degradation. Those who are caught in the midst of a “disaster” in this case being a sudden onset disaster and those forced to move because of “expropriation”- possibly as part of an adaptation project, have limited control over whether environmental disruption will produce migration or not, the last one allows environmental migrants to

to migrate, the ability to decide varies depending on the type of environmental disruption, its origin, intensity and the duration of the environmental disruption. To make matters even more complicated, there is also the case of anticipatory “movers” or “anticipatory refugees” as Kunz describes them, who move in anticipation of the gradual deterioration of their environment.<sup>551</sup> Hence, it is arguably best to view the decision to migrate as a continuum- with involuntary migrants on one end and voluntary migrants on the other.<sup>552</sup> The degree of control over the decision increases as you move from the involuntary end to the voluntary end. Hugo argues that this continuum avoids legalistic definitions, including a broad range of constraints in the decision making process.<sup>553</sup>

This causal requirement shifts the focus of the need to provide protection and humanitarian assistance to victims, hence instead of focusing on vulnerabilities rather than causation and questions about who is responsible for what.

#### ***d. Problems with Individual Status Determination***

McAdam points out a new treaty would be problematic because it privileges CCIM over other types of forced migrants, e.g. those escaping poverty- there is no adequate

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determine how they will respond to environmental change. She further outlines that current literature on environmental refugees has strong regional bias: a big portion of the research is conducted in Africa and Asia, and rarely contains detailed case studies of conditions producing environmental refugees. Moreover the literature resists the use of the term refugee. Those compelled by deficiencies in the local social, economic and environmental context.

<sup>551</sup> E.F. Kunz, *The Refugee in flight: Kinetic Models and Forms of Displacement*, *Internal Migration Review*, 7 (1973)

<sup>552</sup> See Graeme Hugo, *Migration, Development and Environment* (1996), available at [http://publications.iom.int/system/files/pdf/mrs\\_35.pdf](http://publications.iom.int/system/files/pdf/mrs_35.pdf) (last visited Jul. 14, 2016).

<sup>553</sup> *Id.*

legal- moral rationale why CCIM is treated differently. I would argue that it all depends on what we understand to be the reasons for poverty. There is very little contestation to the scientific finding that climate change is the result of anthropogenic activities, more specifically the polluting actions of the developed world since the industrial revolution have contributed in large proportions to global warming. Therefore, one could argue that those who caused it have a moral obligation towards those it is affecting. Moreover, if we think of global justice in terms of distribution, although the idea may not find much acceptance in the economic sense, in the environmental sense, since all humans “own the climate” as a “global commons” or as a common concern or common heritage of mankind, then one could argue that we should share the benefits and burdens of climate change equitably. There is a moral obligation by virtue of that fact alone.

In addition, I argue that a multilateral standalone instrument may not be able to capture all types of scenarios of CCIM. Jane McAdam says that a multilateral instrument modelled after refugee law, i.e. individual status determination would not be suited for some types of displacement scenarios. For instance, for small island states which will have to be evacuated eventually, the individual status determination would not work, they would need to be relocated as a collective, as a community. Defining the persons as climate refugees, argues McAdam may harden the category and exclude some people from much needed assistance. I agree with this stance as well because currently, there is not enough systematic knowledge on how to conceptualize all the different possibilities of movements. There is still a lot of work that needs to be done.

*e. Lengthy treaty making process*

Adopting a new instrument could encounter logistical hurdles as the general landscape of making treaties is a very lengthy process that requires time and resources at various stages: negotiation, drafting, signing, ratification, and entry into force. Moreover, the effectiveness of the new instrument could be undermined because of the need for a vocal advocate- champion- at the international level, either a state or international organization. Treaties tend to be more successful when they have a champion.

*f. Implementation*

It is uncertain whether a new multilateral instrument will actually ensure compliance. For one thing, the treaty's effectiveness hinges on the willingness of states and the number of states that are willing to ratify it. For another, if this instrument is a broad normative framework, it can be difficult to apply it on the ground and hence, it could very well be document that sits around and collects dust.<sup>554</sup>

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<sup>554</sup> The UNFCCC for instance needed an implementing protocol.

## **2. Alternative Approaches proposed by legal scholars**

The proposals for a new multilateral instrument are bold and ambitious, albeit, impractical as of now since adopting a new standalone legal instrument and assuming new legal obligation is not of interest to states as of now. Because of the impracticality of that approach and the difficulty of distinguishing a philosophical justification for it, Jane McAdam and Katrina Wyman propose a different multidimensional approach.<sup>555</sup> Jane McAdam is in favor of policy proposals that strengthen “physical adaptation strategies, expanding migration options, including opportunities for economic, family and educational migration”.<sup>556</sup>

### **i. Global Guiding framework**

McAdam suggests that a global guiding framework which is based on already existing legal obligations would give states time to understand and apply and to build a consensus on big picture issues and state practice would develop over time.<sup>557</sup> Even though this would be in the form of a non-binding legal instrument, she argues that the underlying principles may be binding.

### **ii. Migration Pathways**

For slow onset disasters, McAdam recommends migration pathways allowing for planned movement, which she says recognizes human agency and gives a degree of

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<sup>555</sup> See Wyman *Supra* note 142 and JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW (2012).

<sup>556</sup> JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW (2012).

<sup>557</sup> *Id.*

choice to migrants.<sup>558</sup> The migration pathways are helpful in other ways too. For instance, the money that the migrants send home can help with adaptation measures in the migrants' country. She also suggests that migration eases population pressure at home and creates diaspora communities which will facilitate future movement. It is beneficial to the receiving states as it would very well fill employment needs in the receiving states. However, migration pathways are at the discretion of the host country, unless there is some other way that the migrant can stay in the country longer, for instance by invoking the principle of non-refoulement or some other protection standard. This is a temporary solution and the person can be sent home at any time. Ioane Teitiota met this fate.<sup>559</sup>

### **iii. Relocation**

The third possibility that McAdam suggests is relocation, which would be a good option for very vulnerable communities.<sup>560</sup> This is the approach that is proposed as the most appropriate for small island states and the approach that the former president of Kiribati has been suggesting as the most dignified response.<sup>561</sup> One drawback is that it would result in breaking away from the people's land. For many indigenous communities around the world, land is a very important concept, which ties in with their identity and their history, their way of making sense of the world.<sup>562</sup> As described

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<sup>558</sup> *Id.*

<sup>559</sup> See chapter four.

<sup>560</sup> McAdam, *Supra* note 556.

<sup>561</sup> See for e.g. Anote Tong; Former president of Kiribati, TED talk, [https://www.ted.com/talks/anote\\_tong\\_my\\_country\\_will\\_be\\_underwater\\_soon\\_unless\\_we\\_work\\_together/transcript?language=en#t-386120](https://www.ted.com/talks/anote_tong_my_country_will_be_underwater_soon_unless_we_work_together/transcript?language=en#t-386120) (last visited Jul. 14, 2016). See also <http://www.climatechangenews.com/2016/06/21/anote-tong-migration-is-the-brutal-reality-of-climate-change/> (last visited Jul. 14, 2016).

<sup>562</sup> I have stories from people- social media- reports, articles, interviews in the press.

in chapter three, Ikiribati people have a very strong attachment to the land. The land has personality- they say, “We are the land and the land is us”.<sup>563</sup> While the approach can keep communities together, balancing the needs of existing communities with relocating communities can also be difficult. Relocating whole communities and citizens of a country also could potentially undermine sovereignty, land, culture, self-determination, etc.

#### **iv. Regional Responses**

Both McAdam and Wyman submit that localized regional responses could be an ideal solution.<sup>564</sup> Wyman suggests that this could include creating opportunities for circular migration, staggered migration through guiding principles on internal displacement.<sup>565</sup>

Historically poor communities that are most likely to be hardest hit by global warming have little or no voice in the climate policymaking discussions and are forced to take whatever agreements and rules are established by world leaders rather than having a seat at the table at which the rules are made due to their weak economic position. In addition to diverging inter-state interests, internal socioeconomic and political inequalities exacerbate the non-representation of those that suffer the harrowing consequences of climate change.

The concept of justice that is derived from liberal theories values individual rights at the expense of community rights. It was devised without taking into account the

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<sup>563</sup> Interview with Michael Roman, anthropologist and I-Kiribati climate change activist (Humans of Kiribati, Kiribati Keepers) (Mar. 9, 2016).

<sup>564</sup> See Wyman, *Supra* note 142. See also McAdam, *Supra* note 556.

<sup>565</sup> See Wyman, *Supra* note 142.

culture and history of many African communities, which value the community over the individual. Arguably, allowing for community rights in addition to or instead of individual rights could potentially solve the conundrum concerning the need to find a nexus between the displacement and climate change or isolating climate change from the possible myriad reasons that could induce a person to move. These communal rights empower communities and an analogy could be drawn from communal ownership of land. For this reason, sticking with the traditional conceptions of international law which has not been well-equipped to deal with the variety of issues that have arisen regarding international environmental justice may be counterproductive for the purposes of securing rights for communities affected by climate change induced migration.

Moreover, environmental justice suggests that whatever response is adopted needs to be based on procedural as well as substantive fairness. Procedural fairness in international law has traditionally been based on recognition of sovereign equality of states and equal participation of all states. However, this research will argue that governments do not always adequately represent the interests of people groups (communities) in international negotiations. For this reason, any meaningful response should be based on recognition of the diversity of the affected communities and their participation in the political processes for management of the harm. This research hence, seeks to propose a means to recognizing the communities that are severely affected and allowing them to participate in the discussions leading up to a solution.

Taking into account the fact that people living in the same region usually have similar cultural, linguistic and social experiences and that migration will be mostly within regions, regional responses would be more effective than international responses. In the context of Africa, where state borders are merely colonial creations, homogeneous

communities live straddling state borders. Whenever there is a common problem, some West African communities that are living on both sides of a border have been known to get together in the wake of a communal problem to search for a common solution. This bottom-up decision making model can ensure more participation on the part of those that are affected. Instead of adopting a one size fits all instrument as is being suggested by many, this will allow communities to participate and come up with a sui generis solution that is best fitted for their situation.

### **3. An Overview of Ongoing Efforts by State and Non-State Actors**

The following section outlines the efforts of the global entities that I call “global cosmopolitan actors” in trying to find a solution for CCIM. Their efforts are cosmopolitan in that they are involved in legal projects, drafting processes and activism around CCIM on behalf of people groups that do not belong to the same citizenship as they do.<sup>566</sup>

My finding is that this landscape is characterized by a plurality of actors that are influencing international law in subtle non-traditional ways. The international legal landscape has recently seen many coalitions of state and non-state actors that interact with each other and with state entities to try and shape law, principles, etc., much in the same way that other environmental law regimes are transformed over time.

In addition, based on the work that these organizations do, I was able to see to what extent their interaction with the authorities and other NGOs produced normative instruments. It was interesting to learn about the value they give their outcome document. In the organizations and consultations that I studied, the NGO was not afraid to call their outcome instrument- the Peninsula Principles a soft law instrument, while the intergovernmental consultative committee was adamant that their purpose is not prescriptive, but rather just a fact collecting exercise. Based on what I have observed, it is safe to say that although states are not open to the idea of adopting a new legally binding instrument, they are not completely opposed to norm setting non-binding soft law and protection agendas, etc.

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<sup>566</sup> The system is decentralized and fragmented with many different actors out there. [e.g. Alliance of Small Island states, Manila coalition of vulnerable nations (45 vulnerable nations)].

All three of the organs that I studied sought legitimacy by claiming that they produced their outcome documents through a bottom up procedure. All three of them produced an outcome document, which adds to the “spectrum of international agreements” including soft law, hard law and anything else in between.<sup>567</sup>

Kal Raustalia emphasizes the role of networks in “shaping domestic regulation and facilitating cooperation among regulators” which leads him to conclude that these networks are “clearly tools for the exercise of power- soft power, even as they foster welfare enhancing cooperation overall.”<sup>568</sup> It would be interesting to study what happens to these documents over time. They seem to have a wide acceptance among states at this time. So, is there a possibility that perhaps these will over time establish “state practice” and “opinion juris” and attain customary international law status?

#### **i. The ILA Committees**

In April 2014, I had the opportunity to attend and observe the joint ILA-ASIL Annual Meeting in Washington DC.<sup>569</sup> It was interesting to see that CCIM was an item on the agenda of at least two of the ILA committees; the Climate Change Committee and the Sea Level Rise Committee. The ILA tries to “ensure that a wide range of nationalities and expertise are represented in the membership of the committees”, although from

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<sup>567</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT. ORGAN. 421–456 (2000).

<sup>568</sup> Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA.J. INT’L L. 1 (2002-03).

<sup>569</sup> The International Law Association is an international NGO with a consultative status. Its tasks include “the study, clarification and development” of public and private international law with a view to ensure “the furtherance of international understanding and respect for international law”. The members of the ILA include legal experts (in practice, academia, government, etc.) and non-lawyer experts in various specialized areas (e.g. environment, commerce, industry, etc.) See <http://www.ila-hq.org/> (Last visited Mar. 23, 2016). See also, NEW ILA CONSTITUTION, 3.1, (2014).

what I observed a great number of the members were lawyers from developed countries. I did not see any member who was from the Pacific or from Africa even though these regions are

The ILA Committee on “Legal Principles Relating to Climate Change” presented its third (Final) Report with draft Articles and Commentaries<sup>570</sup> for approval before sending them off to the UN for approval.<sup>571</sup> The report cites treaties and state practice as basis for jurisprudence. Some of the relevant provisions from the climate change draft articles were, Article 6 on special circumstances and vulnerability, article 8.6 on disaster response, Article 4.2 on intra and intergenerational equity, emphasis on urgency- because “delay will shift focus of action from mitigation and adaptation and impact to the most vulnerable and least responsible.”<sup>572</sup> The document also affirmed the obligation of states to provide resources and technologies and the need to move away from formality to more flexible framework in order to encourage efforts. The drafters did not include any provision on CCIM. However, they had discussed the absence any legally binding duty to provide protection for cross border CCIM and the need for cooperation among states to provide needs based protection.<sup>573</sup> In the open session the ILA Committee on “Legal Principles Relating to Climate Change” report, the committee acknowledges that migration is “a natural adaptation strategy, but people forcibly displaced by climate change do not enjoy specific protection under

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<sup>570</sup> The report is available at <http://www.ila-hq.org/en/committees/draft-committeereports-washington-2014.cfm> (last visited Jul. 14, 2016).

<sup>571</sup> The UNFCCC takes into account scholarly writings, custom, etc.

<sup>572</sup> UNFCCC, *Supra* note, art. 4.3.

<sup>573</sup> ILA Report, Committee on Legal Principles Relating to Climate Change, para 13 (2014). <http://www.ila-hq.org/en/committees/draft-committeereports-washington-2014.cfm> (last visited Jul. 14, 2016).

international law” and that “[m]igration’ does not trigger international legal duties beyond States’ obligations under human rights law generally, which are owed to all people within their territory or jurisdiction.” The report further notes that international law does not cover cross border movement beyond complementary or subsidiary protection measures adopted by some states. Beyond calling for cooperation to “improve the ability of the most vulnerable countries to cope with threats and challenges posed by climate change” there was no incorporation of this into the draft articles.<sup>574</sup> Paragraph 14 states, “The international community must cooperate to address climate change migration more coherently by meeting the victims’ protection needs. In general, the humanitarian assistance and human rights communities address the relationship between States and individuals, whereas international environmental law focuses on the State-to-State relationships.”<sup>575</sup>

The Sea level Rise committee on the other hand is still ongoing. The issues that it is dealing with are the prospect of climate change induced sea level rise with the consequent loss of all or parts of state territory raises a number of fundamental considerations touching on a wide range of international law issues, including law of the sea, statehood nationality and human rights. In addition to discussions on how sea level rise affects traditional law of the sea rules on baselines, the committee discussed the implications under international law of the partial and complete displacement, migration or planned relocation of the inhabitants of low lying small island states.

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<sup>574</sup> *Id.*

<sup>575</sup> *Id.* para 14.

**ii. The Nansen Initiative**<sup>576</sup>

The Nansen Initiative was “a bottom-up, state-led consultative process with multi-stakeholder involvement”<sup>577</sup>. It was launched by Norway and Switzerland in 2012 and ended the first part of its mission in December 2015 with the launch of a document—the Nansen Protection Agenda.<sup>578</sup> A question that I had was what was the motivation of the Swiss and the Norwegian governments in starting this? The following is the history of the Nansen Initiative as told by Atle Solberg, head of the Secretariat of the Nansen Initiative.<sup>579</sup> During the UNFCCC negotiations between 2007 and 2009 there was an interest to have a better understanding of the humanitarian face of climate change and what could be the implication for people if mitigation fails and GHGs continue to create a warmer climate.<sup>580</sup> The issue of human mobility, displacement, migration and relocation of people was put on the agenda during those years and in 2010 an adaptation framework was concluded. In the framework states said that they recognized the severe implication for human mobility, i.e. migration, displacement or relocation.<sup>581</sup> Some states mentioned that they wished to promote an enhanced

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<sup>576</sup> <http://www.nanseninitiative.org/secretariat/> (last visited Mar. 23, 2016). The Nansen initiative is not an NGO. It’s an intergovernmental process. This section is based on information I got through interviews and email exchanges with Professor Walter Kaelin who was acting as envoy of the chairmanship of the Nansen Initiative; Atle Solberg, the head of the Secretariat of Nansen and Scott Leckie, a human rights lawyer who was part of the consultative committee that finalized the outcome document of the Initiative. I met the special envoy of the Nansen Initiative- Walter Kaelin at the ASIL-ILA conference in April 2014. I also refer to their outcome documents and their website.

<sup>577</sup> <https://www.nanseninitiative.org/secretariat/> (last visited Mar. 24, 2016).

<sup>578</sup> Interview with Atle Solberg, head of the Secretariat of the Nansen Initiative (Mar. 14, 2016).

<sup>579</sup> *Id.*

<sup>580</sup> *Id.*

<sup>581</sup> *Id.*

understanding, cooperation and knowledge around these issues, but there was no clear knowledge on how to go about it.<sup>582</sup> The issue “lingered” for a while partly because the UNFCCC was not even in force. At the same time, a conversation was taking place at the UNHCR on the occasion of the 60th anniversary of the refugee convention.<sup>583</sup> The high commissioner at that time, Antonio Gutierrez raised an interest to discuss the emerging issues that did not exist in 1951 when the Convention was adopted with a view to be better prepared for the future. When the issue of climate change related movement was raised, the high commissioner was in favor of doing more work on displacement and climate change. He tried to get a message from the governing board of the executive committee to work more systematically on these issues. Since his executive committee stressed that the UNHCR’s mandate was only for refugees that are within the realm of the 1951 Convention.<sup>584</sup> They were not convinced that the UNHCR could do systematic work around these issues, and at that same meeting, when this issue was brought by the governing board of the UNHCR, Norway and Switzerland took the floor and they pledged to continue to work on this and to bring consensus on how to better protect people that are displaced in the context of climate change.<sup>585</sup> At the same meeting Costa Rica, Mexico and Germany said they wanted to support this work as well.<sup>586</sup> Atle Solberg says Switzerland and Norway took this up because they recognize that there is a legal gap in international law in terms of treatment of people who migrate across international borders due to disaster and

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<sup>582</sup> *Id.*

<sup>583</sup> *Id.*

<sup>584</sup> *Id.*

<sup>585</sup> *Id.*

<sup>586</sup> *Id.*

climate change and they wanted to explore policy to better shield that gap, not by engaging in a standard-setting exercise but to try to find principles that can be used for that purpose.<sup>587</sup> Atle Solberg says that this is an extension of Norway and Switzerland's history of being strong supporters of the high commissioner for refugees' work on refugees and IDPs.<sup>588</sup>

Thus the Nansen Initiative was a state-led process with a Steering Group composed of Australia, Bangladesh, Costa Rica, Germany, Kenya, Mexico, Philippines and chaired by the governments of Norway and Switzerland.<sup>589</sup> In the interest of ensuring multi-stakeholder involvement the initiative set up regional consultations for five regions.<sup>590</sup> The five regions were chosen because there was an assumption that these five regions are particularly vulnerable to a natural hazards or geophysical hazards because of their geographical characteristics.<sup>591</sup>

The agenda for each of the consultations was developed on the basis of input from the respective regions. Walter Kaelin, the envoy of the Nansen Initiative says that this is what makes the process bottom-up- that they did not start with pre-conceived

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<sup>587</sup> *Id.*

<sup>588</sup> *Id.*

<sup>589</sup> <https://www.nanseninitiative.org/secretariat/> (last visited June 21, 2016).

<sup>590</sup> According to Atle Solberg, there were several more consultations also with states that didn't have a consultation on the ground. The objective of these regional consultations was to "identify specific challenges facing each of the regions related to human mobility and disasters, and to jointly develop concrete, practical, policy and programmatic outcomes in response to these challenges together with government and other key stakeholders. Email exchange with Professor Walter Kaelin who was representing Nansen throughout the process and providing strategic guidance and input. Interview with Atle Solberg, head of the Secretariat of the Nansen Initiative (Mar. 14, 2016).

<sup>591</sup> Central America is particularly vulnerable to geophysical hazards such as earthquakes and volcanoes, the pacific- due to climate change and the islands being low-lying atolls, very vulnerable to tropical storms, Africa, because of the drought in East Africa and the Horn, South East Asia- tropical storms, cyclones, typhoons and South Asia with the delta and the rivers.

messages but were really listening to stakeholders in the regions.<sup>592</sup> Rather, countries and communities were asked what challenges they are facing and their existing practices for tackling those issues. Solberg agrees that the procedure was “inductive from a methodological point of view.”<sup>593</sup> They convened together with a host state in each region and at every meeting, state participants assembled recommendations on how to address gaps and how to make sure people are better protected.<sup>594</sup> The envoy would make trips to the regions. There was one envoy for the entire process. Walter Kaelin represented Norway and Switzerland, met with different government counterparts- ministry of environment, ministry of development, justice, to build up knowledge to understand what the governments’ priorities were. It took up to nine months from when they started in the region to when the government consultation took place.

And these conclusions made it into the protection agenda, thus the Protection Agenda was not made by experts in Geneva, but rather by the people it would affect, the regional consultation.<sup>595</sup> The ultimate objective was to build a consensus around key

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<sup>592</sup> Email exchange with Professor Walter Kaelin, envoy of the Nansen Initiative.

<sup>593</sup> Solberg emphasized that they were not the hosts, mainly their position was facilitation and consultation. Interview with Atle Solberg, head of the Secretariat of the Nansen Initiative (Mar. 14, 2016).

<sup>594</sup> *Id.*

<sup>595</sup> *Id.* The civil societies were chosen in an inductive way too. For example in the Pacific, they talked to NGOs and the Pacific conference of churches; which has a wide participation of other NGOs in the Pacific countries. The Nansen Initiative asked them to be co-partners and they opened up their network to invite all the organization. In Asia, they co-partnered with Asia Pacific Refugee Rights Network (APRON). They made sure to work with organizations that had existing networks- credibility and a network. Atle: “[O]n Suva in Fiji, we had our civil society consultation and this also fed into the protection agenda. So in that sense, you may agree that that respected the bottom up approach. But this is also a wording that existed before I came and I see your point. I’m not going to defend the bottom up die hard, but I will try to explain all that- you can see that because it was consultative and it was taking us towards a reality rather than a global problem”

elements and principles that can be used to better protect people crossing international borders due to the effect of climate change.<sup>596</sup> Later, these principles would become part of their protection agenda. This protection agenda is a holistic frame for action but not a legally binding instrument. States are given the option of using the outcome document at their own discretion. In December 2015, 109 states participated in a global meeting in Geneva and endorsed the agenda. It entails no legal commitment. The endorsement by the states has no legal binding nature, it is, according to Solberg, endorsing it, is a bit stronger than “taking note of”, but it is less strong than “adopt”: a middle ground, says Solberg, which the Initiative is very pleased with.

“This was not a standard setting exercise”, emphasizes Solberg, because the Initiative was not asked by states to develop binding international obligations or binding standards, just to put together what was already put in practice. It was merely a compilation of these practices. So it seems more like a declaration of good practice across the globe. The priorities of the Nansen Initiative were to develop principles and “make a mark on the global policy process”.<sup>597</sup> In addition to participating in all the COPs since 2012, the Nansen Initiative lobbied for inclusion of displacement into the Sendai Framework on Disaster Risk Reduction and the Paris outcome.<sup>598</sup> The inclusion of Paragraph 49 in the Paris COP decision calling for “a task force to make recommendations on how to avert, minimize and address forced displacement” is one outcome of their participation. At the regional level, the Initiative helped develop the

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<sup>596</sup> *Id.*

<sup>597</sup> *Id.*

<sup>598</sup> Email exchange with Walter Kaelin, envoy of the Nansen Initiative.  
*See also*, <https://www.nanseninitiative.org/portfolio-item/the-realities-of-climate-change/> )

Cartagena Declaration Nansen Initiative.<sup>599</sup>

The Nansen Initiative's first stage ended in December 2015, and now it is just starting its second stage: implementation of policy and norms.<sup>600</sup> How the implementation stage will unfold remains to be seen<sup>601</sup>. In the words of Solberg, "Norway and Switzerland— you know they pledged in 2011 to work with all the states involved- they believe that the protection agenda was endorsed by all the states in October last year- they have fulfilled their pledge."<sup>602</sup>

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<sup>599</sup> Atle Solberg, *Supra* note 596.

<sup>600</sup> During the first stage of the consultative committee primarily had an advisory and expert position.

<sup>601</sup> Scott Leckie, director of Displacement Solutions who was on the consultative committee says although the whole exercise raised the profile of the issue a bit with the protection framework, the impact remains to be seen. A great majority of climate change induced movement is not transboundary but rather internal; hence the looking at only the cross border question seemed incomplete to him. "...Money and resources should not go into the cross border issue alone, to the detriment of all the local displacement. That's as severe..." Interview with Scott Leckie, Director and Founder, Displacement Solutions (Mar. 10, 2016).

<sup>602</sup> Personal interview with Atle Solberg. Germany and Bangladesh will be the chairs and leaders of a new structure of Nansen II.

### iii. Displacement Solutions<sup>603</sup>

Displacement Solutions<sup>604</sup> is an international NGO working in several countries on issues of displacement, particularly work within the already existing housing, land, property rights framework within the jurisdiction<sup>605</sup>. Their main approach is to find reparations and new places for people to move to but they also use a combination of strategies to push sectors in a certain direction.<sup>606</sup>

DS works with networks of partners in in each country: primary and secondary partners and tries to play the role of “useful cohort”. Leckie says, “we never propose anything unless it comes directly from the communities concerned: through the NGOs that we work with, ears to the ground.”<sup>607</sup> DS’s approach is not so much litigation but normative framework. “There’s only so much that the courts alone can do to address a

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<sup>603</sup> I had the opportunity to interview the founder of Displacement Solutions, hereinafter DS, Scott Leckie; an international human rights lawyer. He’s worked in more than 80 countries on various human rights themes, generally on land related questions and residential questions, including where people live, the conditions in which they live and how to help them either return to the homes where they used to live in if they are forcefully displaced, or to find new homes. He has advised UN agencies and NGOs. Personal Interview with Scott Leckie, Director and Founder, Displacement Solutions (Mar. 10, 2016).

<sup>604</sup> It is a 10-year old international NGO. Initially its focus was on restitution issues- how to return refugees and IDPs back into their original homes if they wish to return to but cannot because of problems back home, such as ethnic cleansing. In recent years, it has shifted its primary focus to climate displacement. The NGO is based in Australia but it has a big team, working in different parts of the world.

<sup>605</sup> <http://displacementsolutions.org/> (Last visited Mar. 23, 2016). In the next five years, Scott explained that they plan to work in five countries; Bangladesh, Colombia, Fiji, Panama, Solomon Islands to develop modalities in each one of those countries and to find diagnosis and to systematically identify land parcels where people can foreseeably move to and to develop relocation policies. Personal Interview with Scott Leckie, Director and Founder, Displacement Solutions (Mar. 10, 2016).

<sup>606</sup> *Id.*

<sup>607</sup> For e.g. Bangladesh- NGO- YPSA young power in social action and they’ve been around for 20- 30 years, offices throughout the country and together we do a whole range of things on benefiting climate threatened and climate displaced persons.

problem of this scale. It has to really be political. And political grounded in law.” Their approaches include working within the customary law framework- with village chiefs and an idea of land ownership that is based on use and DS identifies individual countries pieces of land, could be set aside and used by stage to resettle people who are in particularly vulnerable areas. They use a combination of planning, zoning and human rights and administrative law, and small amount of case law in justifying arguments to have progressive laws around planning law, slowly at very local, national and international levels. They propose these to governments, UN and to NGOs.

One of the biggest achievements of Displacement Solutions is producing a “normative framework” on the rights of climate displaced people and obligations- Peninsula Principles on Climate Displacement within States.

The following is an excerpt of an interview I had with Scott. “The Peninsula Principles is a newly formulated normative framework providing clarity on governmental obligations and also individual and household rights to find housing and property solutions. We spent a year coming up with a draft and giving it hundreds of people around the world to comment on and to critique and in the end, it went through thirty or forty different drafts. Then I convened a meeting with a bunch of lawyers in the UN, judges and climate change people and grassroots strugglers, here in Australia in 2013 and we finalized it then and it’s been doing the rounds for the past two and half years now. We’ve translated it to eight or ten different languages. We’ve done a lot of training courses on it, meeting with every government in the world and governments are slowly but surely starting to use them. And they’re not saying we agree to be bound by the Peninsula Principles but what they are saying is we’re taking guidance from the Peninsula Principles. It is a useful document and a model on which to build

our policy [].”<sup>608</sup>

Although this is not a binding document, the director of DS says that these principles are being used increasingly by climate affected communities and even “percolating down into government policy in a range of countries”.<sup>609</sup> For e.g. the Bangladesh Climate Policy contains many of the peninsula principles for domestic implementation of policies. Scott says that the Peninsula Principles are in some way shaping policy in Fiji, and also the approach in the Solomon islands, Ecuador, Colombia, Panama and, Bangladesh.<sup>610</sup> The Peninsula Principles is a soft law instrument that administrative bodies, communities and perhaps courts can refer to. In the words of Scott Leckie, “We want judges to use them as well, [...] how to get judges to be more proactive, but don’t engage in litigations, but talk to lawyers, people, judges, people contemplating litigations.”<sup>611</sup> The idea is to develop a normative framework that would qualify as an Article 38 (1)(d) of the Statute of the International Court of Justice source of international law.<sup>612</sup> Leckie says, “We invoked that as the basis for the Peninsula principles and put together this document which others now call soft law. And sooner or later, it may have happened already. I’m involved in so many different projects, it’s so hard for me to keep track of everything but a growing number of judges refer to that

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<sup>608</sup> Interview with Scott Leckie, Director and Founder, Displacement Solutions, (Mar. 10, 2016).

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*

<sup>611</sup> *Id.* To emphasize the impact that this document will have on the judiciary, he adds, “on the judicial side of things- I’m not sure what others have found to see if hasn’t happened yet- I’m sure it will happen soon.”

<sup>612</sup> Statute of the I.C.J., art. 38(1), Sources of International Law, available at <http://www.icj-cij.org/documents/?p1=4&p2=2> (last visited Jul. 14, 2016). According to the ICJ statute on the sources of international law, article 38(1)(d) “subject to the provisions of Article 59, [.i.e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

obviously strengthen it further.”<sup>613</sup>

The reason DS chose to develop it into a soft law instrument is because of the failure of many global initiatives that have been trying to get a new convention on the rights of people displaced because of climate change. Although DS has no objection to such a multilateral instrument in principle, the politics of trying to get a convention adopted is almost impossible to surmount. Hence it opts to operate within an already well established system, or based on a soft law instrument that is “grounded fully in pre-existing international legal obligations.”<sup>614</sup>

Although DS is not actively engaged in lawmaking- for e.g. the COPs of the UNFCCC, they try to influence the negotiations through their friends and networks; in a roundabout way.<sup>615</sup> For instance, someone working on the advisory counsel to the human rights counsel of the UN could approach DS for counsel on climate displacement; Scott would try to push the Peninsula principles through those types of networks.<sup>616</sup> They have at least one key partner in each of the countries and try to maintain good working relations with government.<sup>617</sup> This means that they will try to avoid blaming government in the “typical human rights way.” Scott says, “to the extent that we can collaborate- make their lives better rather than harder.”<sup>618</sup>

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<sup>613</sup> Interview with Scott Leckie, Director and Founder, Displacement Solutions, (Mar. 10, 2016).

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*

<sup>616</sup> *Id.*

<sup>617</sup> *Id.*

<sup>618</sup> *Id.*

#### 4. A Holistic Response to CCIM

The earth's climate is part of the global commons.<sup>619</sup> Because the causes and effects are transboundary, political cooperation needs to occur on a global scale in order to be effective. We are not affected by the policy decisions of our polity alone but rather by the choices that other polities are also making. As we have said earlier, the decisions that past generations have made affect the lives of the present generation and those of the present generation affect the livelihoods of contemporary communities in other parts of the world and the lives of future generations. Thus, migration and climate change inherently raise inquiries about burden and benefit sharing across geography, ethnic, national and other divides. Generally questions about what is the right political, economic or legal course of action we need to take as part of a collective- locally, nationally and globally all become questions that need to be posited contextually, having all of those issues in mind.

From an economic point of view, there is a disparity between the haves and have nots. There are arguments that the industrialized nations have benefited economically from the emissions that gave rise to or contributed to climate change. The global South on the other hand, has not contributed as much to anthropogenic climate change but has limited economic resources to tackle the effects of the change in the climate that the global North helped to create and aggravate.

While the cosmopolitan approach provides a solid moral basis for providing protection for those who are affected by CCIM, it is missing a key element, in that it does not factor in the place of history in creating and reinforcing vulnerabilities. Although a

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<sup>619</sup> The drastic change in the earth's climate in recent years is due to an increase in the concentration of man-made GHGs- dust, soot, and other particles in the atmosphere. These particles either reflect or absorb incoming solar radiation, which leads to cooler or warmer conditions *See, Toulmin, Supra* note 57, at 17.

conversation about poverty is important, it is also necessary to address the historical background. For instance, many of the communities that are negatively impacted by climate change in developing world were colonized by the European powers. The overexploitation of resources in some of the small island developing states has greatly contributed to their land being degraded and in some cases rendered uninhabitable.

The I-Kiribati people that I interviewed recounted the story of Banaba, an island that the British mined phosphate from until it was completely depleted. In order to do this, the British relocated the islanders to Ranbi another island in Fiji. After they have overexploited the land, it is now uninhabitable.

My research findings show that currently there is no need for adopting a new multilateral instrument to govern CCIM. It is more helpful to work with already existing relationships and systems, including new and progressive definitions and building knowledge over time. When there is new knowledge it could

A new treaty could close some gaps but then leave out many different issues and if we try to search for a common denominator, it could arguably dilute the protection given by the instrument. A declaration, further down the line could be used as codification of customary international law than a new treaty.

One of the sources of international law is customary international law: international customary law: *opinio juris*+ state practice. Over time the practice that is in the instruments adopted could perhaps evolve into customary international law.

## **5. Conclusion**

In this chapter I discussed some policy and legal developments on CCIM that are taking place at the international level. As of now, many international institutions such as the UNHCR and IOM do not have a clear policy on this.

Although many academics have proposed the adoption of multilateral instruments to address CCIM; many of those actively working on the ground on CCIM reject it by saying that this is based on a romanticized but unrealistic view of what the law can achieve. Instead of multilateral solutions, they focus on regional or even bilateral legal and policy solutions, and alternative paradigms.

## CHAPTER 6

### CONCLUSION

*"I've been traveling the world to try and get people to understand. We have a plan; we think we have a plan. And on one occasion, I think I spoke in Geneva and there was a gentleman who was interviewing me on something like this, and I said, "We are looking at floating islands," and he thought it was funny, but somebody said, "No, this is not funny. These people are looking for solutions."<sup>620</sup>*

Anote Tong, Former president of Kiribati

(In office: 10 July 2003 – 11 March 2016)

This dissertation introduced the main controversies on CCIM in legal, policy and academic circles.

As I have discussed in the preface of dissertation, my interest in the topic first began with particular events that unfolded in my country of origin, Eritrea, an underdeveloped country in the horn of Africa whose ecosystem has been tremendously impacted by decades of war and climate change. In recent years, Eritreans have been risking their lives by crossing borders into neighboring countries, sometimes illegally, to flee from, among other things, human rights abuse, political and religious

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<sup>620</sup> Anote Tong; Former president of Kiribati, TED talk, [https://www.ted.com/talks/anote\\_tong\\_my\\_country\\_will\\_be\\_underwater\\_soon\\_unless\\_we\\_work\\_together/transcript?language=en#t-386120](https://www.ted.com/talks/anote_tong_my_country_will_be_underwater_soon_unless_we_work_together/transcript?language=en#t-386120)

persecution, drought and bleak economic prospects, adding to the large number of refugees and migrants from Africa arriving on Europe's shores in great numbers. In spite of the dangers associated with this kind of border crossing, the numbers continue to increase in a manner that can only be described as an exodus.

There is a wide consensus that climate change will continue to profoundly impact ecosystems and human communities alike. It is already causing drought in some places, floods in others, and other extreme weather patterns.

### **1. Findings**

Through this study, I have provided a synthesis of the various issues that are raised by climate change induced migration. The following are the major findings of the research.

First, I have shown that CCIM is highly complex and multifaceted. A discussion on the question of what is the cause of climate change and focusing on determination of responsibility for CCIM could divert attention from the need to respond to the problem. Studying the impact of climate change on a community, a region, a people group, etc. cannot be done divorced from the constitutive realities of the community. I demonstrate that CCIM is not merely a story of the environment but also of people and vulnerabilities. The impacts of climate change are not uniform. The experiences of people in different geographies, socioeconomic, cultural and political positions are different. From the East and North African droughts, to the floods of Bangladesh, to the existential crisis of small island states, the impacts of climate change are very diverse and complicated. Climate change is the only unifying factor. Moreover, the same weather event in the same area could produce different results for people depending on their particular circumstances. The encounters that people have with

climate change related weather events also determines the conversations that they are having and informs their activism around climate change related issues. In the small island state of Kiribati for instance, conversations about climate change occur on a daily basis. For those of us who are only remotely engaged in these conversations, it is an exercise in academic curiosity. For the people of the small island developing states however, it is a daily occurrence. They are indeed, at the frontlines of climate change.

Therefore, I conclude that vulnerabilities should be conceptualized contextually with due regard to not only the environmental aspect but also all the underlying elements that could interact to cause vulnerability.

Second, I have also shown that in climate change related issues, law is operative in nontraditional ways. Climate change in general and CCIM in particular showcase the increasing involvement of state and non-state actors- global cosmopolitan actors- in global lawmaking and administration. There is also a plethora of instruments that these actors produce- some with normative- prescriptive content. Although these are not legally binding, many states appear to be open to endorsing or incorporating these non-legally binding instruments. For example Bangladesh has incorporated the Peninsula Principles – a soft law guiding instrument for addressing CCIM within the country- which was produced by Displacement Solutions (an NGO).

Third, I found that a lot of the activism on CCIM is being taken by small island developing states. Starting from the grassroots level all the way up to the state and global level, there is a lot of activism around this to try and bring awareness about what is happening in those islands.

Fourth, I show that a supplementary account of vulnerability that needs to be taken into account is history. However, this did not appear in the existing literature. The

colonial past of many of these developing countries has resulted in the depletion of resources and also in displacement in some cases. The connection between history and vulnerability to climate change thus needs to be studied.

## **2. Normative Considerations**

The study also looks at how the law responds to CCIM and analyzed the major proposals for response. The study showed that while at the domestic level, a lot of countries have some type of mechanism of providing assistance and protection to internally displaced persons, transboundary movement because of climate change is not specifically provided for in international law. Unless the movement was in some way linked with a 1951 convention ground for refugee protection, there is virtually no avenue for refugee or asylum status because of the impacts of climate change.

Case law from Australia and New Zealand shows that courts are reluctant to expand the meaning of refugee to include climate change victims. In the recent high profile Ioane Teitiota case, the Supreme Court justice seemed sympathetic to the claim, although he ended up rejecting it. (Possibly as a matter of policy and because of New Zealand's strict policy on illegally overstaying one's visa.)

A similar case where the petitioner dropped his refugee claim to make a humanitarian one was successful however, pointing to the conclusion that although New Zealand courts are reluctant to push the boundaries of refugee protection, they recognize the impacts of climate change as severe and are sympathetic to the plight of small islanders.

As has been discussed in this study, the emerging problem of CCIM seems to point to a clear need for a specialized legal instrument to fill the gap. However, there is no

single multilateral response that could miraculously solve the CCIM problem, as the drivers of displacement are diverse and complicated. Moreover, a multilateral response would be difficult to come by because of logistic considerations and the lack of political consensus on climate change issues at the global level.

An effective response is one that reflects that displacement is not merely a story of the environment but a story of people, underlying inequalities and vulnerabilities in a system. Its legitimacy should also be based on the voice of stakeholders. The responses proposed by advocacy groups and legal scholars seem to focus more on the physical aspect of the movement and sometimes are completely blind to the underlying socio-economic and political realities which cause vulnerability in the first place. Therefore I envisage a holistic multi-level solution, at the community, regional and global levels.

At the community level, there is still a great need to conduct more research in order to understand how climate change interacts with already existing stresses. CCIM could be a response in some cases of climate change impacts. Ensuring participation of the affected people and regional cooperation with guarantees of assistance and shared responsibility should be at the heart of the solution. There are many human rights that are at stake and many avenues for protection within the state. They just need to be applied effectively.

At the national and global level, I argue for a rights based response backed by a cosmopolitan conception of justice rather than a purely statist or international response.

I argue that a cosmopolitan conception for the purpose of CCIM is one that recognizes the individual worth of each person and incorporates elements of environmental

justice- the equitable distribution of global harms and benefits. I argue that this cosmopolitan ideal can be translated into cooperation among states, migration pathways through education programs, soft law instruments and migrant worker programs which are also good options for some categories of people that are affected by climate change.

The study has also shown that certain parts of the world are affected more severely than other places. People whose environment is no longer able to sustain their livelihoods would thus be considered as victims of environmental injustice. While some communities had benefited from industrialization which contributed to climate change, [potential] forced migrants become victimized as a result of the actions of those who benefited. Environmental justice would mandate that the harms and benefits be shared between the communities in an equitable manner. Hence, one can envisage a situation where industrialized nations would be obliged to provide help to developing and underdeveloped countries that have populations threatened by climate change induced migration. I argue that they can provide humanitarian aid in times of humanitarian crisis ensuing from a sudden onset disaster caused by climate change. Another way is having lax immigration schemes that would allow for climate change migrants to enter into and be assimilated in the countries with relative ease.

## APPENDIX

### Landmarks of the International Climate Change Regime

**Table 1: Landmarks of the International Climate Change Regime Pre-UNFCCC**

621

<b>Date/conference Organizer</b>	<b>Conclusions and principal recommendations</b>	<b>Outcome</b>
Feb. 1979 First World Climate Conference	1st major global recognition of man's role in climate change and was a foundation for the UN's panel to study the issue nine years later.  “Carbon dioxide plays a fundamental role in determining the temperature of the earth’s atmosphere, and it appears plausible that an increased amount of carbon dioxide in the atmosphere can contribute to a gradual warming ... but the details of the changes are still poorly understood.” — Report’s Official Declaration	Report recognizing anthropogenic climate change Basis for IPCC studies
1985 Villach conference Organized by WMO and UNEP	<ul style="list-style-type: none"> <li>• Significant climate change highly probable</li> <li>• States should initiate consideration of developing a global climate convention</li> </ul>	
Nov. 1988 Toronto Conference IPCC Established  Organized by Canada	Global Co2 emissions should be cut by 20 percent by 2005 States should develop comprehensive framework convention in the law of the atmosphere.  World Meteorological Organization and UN Environment Program UNEP establish the Intergovernmental Panel on Climate Change IPCC. To this day IPCC assessments are the scientific underpinning of international negotiations while also providing unique insights into, for example, managing the risk	The World Meteorological Organization and the United Nations Environment Program form the established the IPCC in order to assess available scientific data and the possible broader impacts of climate change and to propose a global responses for mitigation and adaptation to climate change.

<sup>621</sup> Source: from <http://unfccc.int/timeline/>

	of extreme events and disasters.	
1988 Un General Assembly Organized by UN	Climate change as "common concern of mankind"	Un General Assembly stated that climate change is a "common concern of mankind"
1989 Noordwijk Conference Organized by Netherlands	Industrialized countries should stabilize GHG emissions as soon as possible.	
1989 Hague Summit Organized by Netherlands	Signatories will promote new institutional authority to combat global warming	
Nov. 1990 IPCC first assessment report Organized by WMO and UNEP	Global mean temperature likely to increase by about 0.3 degrees Celsius per decade, under business as usual emissions scenario IPCC and Second World Climate Conference Call for Global Treaty  The IPCC releases the first assessment report saying "emissions resulting from human activities are substantially increasing the atmospheric concentrations of greenhouse gases" leading to calls by the IPCC and the second World Climate Conference for a global treaty.	The IPCC's first assessment report states that global mean temperature will likely rise by about 0.3 degrees Celsius per decade.
Dec. 1990 UN General Assembly Negotiations Organized by UN General Assembly	On 11 December 1990, the UN General Assembly establishes the Intergovernmental Negotiating Committee (INC) for a Framework Convention on Climate Change. The INC held five sessions where more than 150 states discussed binding commitments, targets and timetables for emissions reductions, financial mechanisms, technology transfer, and "common but differentiated" responsibilities of developed and developing	Establishment of INC

	countries.	
May 1992 Second World Climate Conference Organized by WMO and UNEP	<p>Countries need to stabilize GHG emissions Developed states should establish emissions targets and/ or national programs or strategies Convention Adopted</p> <p>The text of the United Nations Framework Convention on Climate Change is adopted at the United Nations Headquarters in New York.</p>	
Jun 1992 Rio Earth Summit UNCED conference Organized by UNCED	<p>UNFCCC Opens for Signature at Rio Earth Summit</p> <p>The United Nations Framework Convention on Climate Change opens for signature at the Earth Summit in Rio, bringing the world together to curb greenhouse gas emissions and adapt to climate change. The UNFCCC has two sister Conventions also agreed in Rio, the UN Convention on Biological Diversity and the Convention to Combat Desertification.</p>	
Mar. 21, 1994	<p>UNFCCC Enters into Force</p> <p>The United Nations Framework Convention on Climate Change, spawned two years earlier in Rio, enters into force. Countries that sign the treaty are known as "Parties". With 196 Parties, the UNFCCC has near-universal membership. Parties meet annually at the Conference of the Parties (COP) to negotiate multilateral responses to climate change.</p>	

**Table 2: Landmarks of the International Climate Change Regime Post-UNFCCC**  
622

<b>Date Event/ conference</b>	<b>Conclusions and principal recommendations</b>	<b>Outcome</b>
Apr. 1995 Fist COP- Berlin	Berlin Mandate authorizing negotiations to strengthen FCCC commitments Germany's then environment minister, Angela Merkel, presides over the first Conference of the Parties (COP 1) in Berlin, where Parties agreed that commitments in the Convention were "inadequate" for meeting Convention objectives. The Berlin Mandate establishes a process to negotiate strengthened commitments for developed countries, thus laying the groundwork for the Kyoto Protocol.	
Aug. 1996 Bonn	The UNFCCC secretariat relocates from Geneva to its current home in Bonn, paving the way for the city to become an international sustainability hub and home to 18 UN organizations employing around 1.000 staff, of which the UNFCCC is the largest.	UNFCCC Secretariat Moves to Bonn
1996 2nd COP	Geneva Ministerial Declaration	
Dec. 1997 3rd COP	Kyoto Protocol The protocol requires 37 industrialized nations, including the US to reduce GHGs. The larger burden falls on developed countries because , the protocol argues  The third Conference of the Parties achieves an historical milestone with adoption of the Kyoto Protocol, the world"s first greenhouse gas emissions reduction treaty.	The Kyoto Protocol is adopted
Apr. 1998	global warming skeptics make a plan <ul style="list-style-type: none"> <li>• Kyoto is expensive</li> <li>• It puts too much of a burden on developed</li> </ul>	

<sup>622</sup> Source: from <http://unfccc.int/timeline/>

	<p>countries</p> <ul style="list-style-type: none"> <li>• Lee Raymond, chief executive : convinced that the science was wrong</li> <li>• Exxon: funds to prove this theory</li> <li>• Started gathering signatures in order to say that there are climate change skeptics.. Evidence of consensus of issue.. Still gathering.. Tsktsk</li> </ul>	
1998 4th COP	Buenos Aires Plan of Action	
1999 5th COP		
2000 6th COP		
Jul. 2001	A major breakthrough is achieved at the second part of the sixth Conference of the Parties meeting in Bonn, with governments reaching a broad political agreement on the operational rulebook for the 1997 Kyoto Protocol.	
Nov. 2001 7th COP	<p>Marrakesh</p> <p>The seventh Conference of the Parties results in the Marrakesh Accords, setting the stage for ratification of the Kyoto Protocol. This would formalize agreement on operational rules for International Emissions Trading, the Clean Development Mechanism and Joint Implementation along with a compliance regime and accounting procedures.</p>	
2001	<ul style="list-style-type: none"> <li>• Bush declines to send Kyoto to congress for ratification  “The president has been unequivocal. He does not support the Kyoto treaty.”  — White House spokesman Ari Fleischer</li> </ul>	
2002 8th COP		
2003		

9th COP		
2004 10th COP		
Jan 2005	<p>EU Emissions Trading Launches</p> <p>The European Union Emissions Trading Scheme, the first and largest emissions trading scheme in the world, launches as a major pillar of EU climate policy. Installations regulated by the scheme are collectively responsible for close to half of the EU's emissions of CO<sub>2</sub>.</p>	
Feb. 2005	<p>Kyoto Protocol Enters into Force, but major emissions producers, Russia and US are not on board.</p> <p>History is made when the Russian Federation submitted its instrument of ratification to the Kyoto Protocol, sealing its entry into force.</p>	
Dec. 2005 11th COP- Montreal	<p>Following the entry into force of the Kyoto Protocol earlier in the year, the eleventh Conference of the Parties (COP 11) for the first time is held in conjunction with the first Conference of the Parties serving as the Meeting of the Parties (CMP 1).</p>	
Jan. 2006	<p>Clean Development Mechanism Opens</p> <p>The Clean Development Mechanism, a key mechanism under the Kyoto Protocol, opens for business.</p>	
Nov. 2006	<p>Nairobi</p> <p>At the twelfth Conference of the Parties held in Kenya, the Subsidiary Body for Scientific and Technological Advice SBSTA is mandated to undertake a programme to address impacts, vulnerability and adaptation to climate change - the Nairobi Work Programme NWPactivities are ongoing.</p>	
2006	2006: Exxon Mobil acknowledges that (Rex	

	<p>Tillerson)</p> <p>“We recognize that climate change is a serious issue. We recognize that greenhouse gas emissions are one of the factors affecting climate change.” —Tillerson, in an interview with <i>The New York Times</i></p>	
May 2006	<p>May: the competitive enterprise institute: a free market think tank: carbon dioxide, they call it pollution, we call it life.</p> <p>May: an inconvenient truth is released Al Gore: after losing the presidential elections, produces "An Inconvenient Truth, chronicling Gore's personal interest on the issue.</p>	
Jun. 2006	<p>June; a public opinion poll in the US finds that 41 percent of Americans believe that there is solid evidence that the earth is warming due to human activity.</p>	
2006 12th COP		
Oct. 2007	<p>Oct 12, 2007: sept. Gore is criticized by Fox News for his carbon footprint Oct 12: Gore and the IPCC receive the Nobel peace prize Gore's acceptance speech "now comes the threat of climate crisis, a threat that is real, rising, imminent and universal. Once again, it is the 11th hour</p>	
Nov. 2007	<p>Nov 17: UN releases definitive report on climate change</p> <ul style="list-style-type: none"> <li>• The IPCC confirms through the report that climate change is occurring now, mostly as a result of human activities.</li> <li>• 500 lead authors and 2000 expert reviewers= report is deemed the most definitive to date on global warming.</li> </ul> <p>"warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread</p>	

	melting of snow and ice and rising global average sea level.... There is very high confidence that the global average net effect of human activities since 1750 has been one of warming. "	
Dec. 2007 13th COP- Bali	The thirteenth Conference of the Parties adopts the Bali Road Map, including the Bali Action Plan, charting the course for a new negotiating process to address climate change. The Plan has five main categories: shared vision, mitigation, adaptation, technology and financing.	
Jan. 2008	Joint Implementation Mechanism Starts  The Kyoto Protocol mechanism "Joint Implementation" starts. This allows a country with an emission reduction or limitation commitment under the Protocol to earn emission reduction units (ERUs) from an emission-reduction or emission removal project in another country with similar commitments.	
Dec. 2008 14th COP- Poznan	The fourteenth Conference of the Parties in Poznan, Poland, delivers important steps towards assisting developing countries, including the launch of the Adaptation Fund under the Kyoto Protocol and the Poznan Strategic Program on Technology Transfer.	
2008	Heartland Institute holds its first conference on climate change	
Jun. 2009	June 2: Climate Skeptics Release Report  The Nongovernmental International Panel on Climate Change, (NIPCC), a group established to study the findings of the UN's climate-change panel, releases a report (pdf) published by the Heartland Institute, noting that the earth may be warming, but that the cause is primarily natural:  "A warmer world will be a safer and healthier	

	world for humans and wildlife alike.”	
2009 15th COP- Copenhagen	December 2009 Copenhagen  World leaders gather for the fifteenth Conference of the Parties in Copenhagen, Denmark, which produced the Copenhagen Accord. Developed countries pledge up to USD 30 billion in fast-start finance for the period 2010-2012.	
Jan. 2010	In January 2010: NASA reports that 2000-2009 was the warmest decade on record.  May: New report from NAS Its most comprehensive report to date  "Climate change is occurring, is caused largely by human activities and poses significant risks for and in many cases is already affecting - a broad range of human and natural systems."	
May 2010	Open letter from 255 members of the NAS: "we call for an end to McCarthy like threats of criminal prosecution against our colleagues based on innuendo of guilt by association	
Dec. 2010 16th COP- Cancun	The sixteenth Conference of the Parties results in the Cancun Agreements, a comprehensive package by governments to assist developing nations in dealing with climate change. The Green Climate Fund, the Mechanism and the Cancun Adaptation Framework are established.	
Dec. 2011 17th COP- Durban	At the seventeenth Conference of the Parties, governments commit to a new universal climate change agreement by 2015 for the period beyond 2020, leading to the launch of the Ad Hoc Working Group on the Durban Platform for Enhanced Action or ADP.	

	<p>Momentum for Change, launched- a special initiative of the UNFCCC, shines a light on innovative and transformative climate action taking place around the world.</p>	
<p>Dec. 2012 18th COP- Doha</p>	<p>At the eighteenth Conference of the Parties, governments agree to speedily work toward a universal climate change agreement by 2015 and to find ways to scale up efforts before 2020 beyond existing pledges to curb emissions. They also adopt the Doha Amendment, launching a second commitment period of the Kyoto Protocol.</p>	
<p>Sep. 2013</p>	<p>New Home for UNFCCC Secretariat</p> <p>The UNFCCC secretariat moves to its new headquarters on the UN Campus in Bonn, next to the former German Parliament building. Following major improvements, the building is now a beacon of environmental performance deploying features like solar power and smart lighting.</p>	
<p>Sep. 2013</p>	<p>IPCC Releases 2nd Part of Fifth Assessment Report</p> <p>The UN Intergovernmental Panel on Climate Change (IPCC) releases the Working Group 1 contribution to its Fifth Assessment Report (AR5), on the science of climate change.</p>	
<p>Nov. 2013</p>	<p>Warsaw</p> <p>The nineteenth Conference of the Parties produces the Warsaw Outcomes, including a rulebook for reducing and a mechanism to address loss and damage caused by long-term climate change impacts</p>	
<p>Mar. 2014</p>	<p>20th Anniversary UNFCCC</p> <p>The United Nations Framework Convention on Climate Change (UNFCCC) celebrates its</p>	

	20th anniversary. Reality check- infographic	
Mar. 31, 2014	IPCC Releases 2nd Part of Fifth Assessment Report  The UN Intergovernmental Panel on Climate Change (IPCC) releases the Working Group 2 contribution to its Fifth Assessment Report (AR5), on impacts, adaptation and vulnerability.	
2013 19th COP		
Dec. 2014 20th COP- Lima	At the twentieth Conference of the Parties, world governments will have the opportunity to make a last collective push towards a new and meaningful universal agreement in 2015.	
Sep. 2014	UN Secretary-General's Climate Summit  UN Secretary-General Ban Ki-moon to host a climate summit in New York, inviting Heads of State and Government, business, finance, civil society and local leaders to mobilize action and ambition on climate change in advance of COP 21 in Paris in 2015.	
2015 21st COP	December 2015 COP 21 -	

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