

**Legal protection of the people at risk of climate-
induced cross-border displacement: application of the
1951 Refugee Convention**

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Introduction

It is widely recognized that climate change is the main environmental problem facing the globe. We can observe that the number of natural catastrophes is swiftly growing and this means that climate change is advancing. Such climate change related effects as: ice melting, rising of the sea levels, changing rainfall patterns, floods, and the spread of water and vector born diseases have a horrific impact on human inhabitants. Already in 1990, the Intergovernmental Panel on Climate Change (IPCC) predicted that the greatest impact of climate change might be on human migration.¹ Although it is complicated to estimate the precise numbers of those likely to be displaced as a result of global warming, scientists predict the number will be between 50 million and 350 million by 2050.²

The current situation in Bangladesh is one of the most striking examples of such evidence, that climate induced displacement is not just a matter for future concern. This country is among the most environmentally vulnerable regions, due to its geographical and spatial location, with around twenty percent of the land one meter or less above the sea-level. According to the 2007 UN Forth Assessment Report of the Intergovernmental Panel on Climate Change, a one-meter rise of sea-level, will cost Bangladesh up to seventeen percent of its land, and will displace at least 35 million people by 2050³.

However, the protection of people at risk of climate induced cross-border displacement is presenting a huge challenge from a legal prospective. One of the problems concerning climate induced displacement arises from the fact that the link between climate change and cross-border migration is considered to be debatable among scholars. The discussions centre on some uncertainties about the existence of ‘environmental refugees’,⁴ and whether climate change can be considered a push factor for movement. It is highly important to establish a cause-effect relationship between climate change and human relocation, and analyze the specificity of this category of migrants.

The fact that the category of environmental refugees is relatively new and that is not fully recognized by scholars, is leading to the problem with a legal protection of this group. On the international level, the only existing instrument for the protection of people induced for cross-border relocation is the 1951 United Nations Convention relating to the Status of Refugees, with

¹ Climate Change: The IPCC 1990 and 1992 Assessments, IPCC First Assessment Report Overview and Policymaker Summaries, and 1992 IPCC Supplement, pg.55.

² United Nations, Report of the Secretary-General on Climate change and its possible security implications, 11 September 2009, UN document A/64/350, pg.15.

³ IPCC, Fourth Assessment Report: Climate Change 2007, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, pg. 488.

⁴ Oli Brown, Migration and Climate Change, International Organization for Migration, Geneva, 2008, pg.11.

its one Optional Protocol.⁵ The Refugee Convention, as modified by the 1967 Optional Protocol, was basically created as a response to post-World War II demands, and it defines refugee as a person who has fled his or her country because of well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.⁶ There is an active discussion and still no consent between authors if the Refugee Convention can be applied in the case of climate induced displacement.

One of the significant difficulties in qualifying environmentally displaced persons as refugees under international law is the difficulty in characterizing natural disasters as persecution. The UNHCR Handbook, which is the most authoritative interpretation of the 1951 Refugee Convention and the 1967 Refugee Protocol, affirms that “[t]here is no universally accepted definition of “persecution”.”⁷ Another obstacle for the protection of environmentally displaced people under refugee definition, is the fact that persecution must be based on certain grounds. As it is specified in the refugee definition, reasons for persecution are limited to “race, religion, nationality, membership of a particular social group or political opinion”.⁸ The list of grounds for the persecution is exhaustive, and this makes it quite difficult when it comes to the protection of climate refugees. Furthermore, the concept of a refugee “tends to imply a right of return once the persecution that triggered the original flight has ceased”, which could be impossible in the case of the climate refugees, who might have lost a place to which they might go back.⁹

It seems clear that there are some gaps in the legal protection of people at risk of cross-border climate induced displacement. Thus, the problems related to the status of people at risk of cross-border climate induced displacement require closer attention and detailed analysis.

The central research question, which this thesis aims to answer, concerns the extent to which the existing international legal framework, namely the 1951 Convention relating to the Status of Refugees, can be applied for the protection of people at risk of cross-border climate induced displacement. Furthermore, the research will present and investigate some of the possible solutions for tackling the problem of the protection of people induced for cross-border displacement by climate change.

In order to reach the research goal, firstly the relation between cross-border displacement and climate change will be analyzed, with an attempt to identify whether there is the causation

⁵ Convention relating to the Status of Refugees, 28 July 1951, UNTS 137, 189, read in conjunction with Protocol relating to the Status of Refugees, 31 January 1967, UNTS 267, 606, Art. 1A(2).

⁶ Ibid.

⁷ Jeanhee Hong, Note, Refugees of the 21st Century: Environmental Injustice, Cornell University Law School, Volume 10, Number 2, Spring 2001, pg. 330.

⁸ Convention relating to the Status of Refugees, supra note 5.

⁹ Migration and Climate Change, supra note 4, pg.14.

link among them. The investigation of the scientific sources and statistical data will show how climate change is provoking cross-border migration. Then, the most significant political, economic and social problems related to climate induced cross-border displacement will be named. These will show why it is important to take these issues into account, and prove that the case of cross-border displacement needs specific attention

The second chapter aims to analyze the nature of the 1951 Convention relating to the Status of Refugees. It will provide an overview and the historical background of the Convention. For this purpose, the text of the Convention and the works of legal researchers in this area will be examined. Particular attention will be focused on the existing definition of refugee which it contains, and the main characteristics of this term. Further, the category of environmentally displaced people and its specificity will be analyzed. Ultimately, these will allow for identifying the main obstacles for the application of the Refugee Convention for the protection of the climate induced refugees, and will show the existing legal gaps.

The third chapter will search for a suitable protection mechanism for people induced for cross-border displacement by climate change. In this chapter, the case of India and Bangladesh, as one of the most striking examples of climate induced displacement, will be introduced. Then, several proposals which exist in the legal literature on how the issue can be solved will be analyzed. The effectiveness of those suggestions will be tested using the India-Bangladesh case. Ultimately, the one, which seems the most suitable and realistic, will be identified.

In the final part of this thesis, the most important findings about climate induced cross-border displacement will be enumerated. It will be concluded whether the 1951 Convention relating to the Status of Refugees, to any extent can be applied for the protection of climate refugees, and whether the issue can be resolved.

1. Climate change and cross-border displacement

1.1. Introduction

It can be observed through statistical data, what a horrific impact climate change has on the human inhabitants. According to the International Disaster Database report, the number of natural catastrophes has doubled over the last two decades.¹⁰ Such a high number of weather-related natural disasters, and the continuation of the global rise in temperature, are indicating the advancement of climate change. Already in 1990, the Intergovernmental Panel on Climate Change (IPCC) predicted that the greatest impact of climate change might be on human migration.¹¹ The following reports reaffirm that fact and provide new alarming numbers, such as an increase in the total number of international migrants during the last ten years from an estimated 150 million in 2000 to 214 million persons today.¹² The link between climate change and cross-border migration is considered to be debatable among the scholars. This chapter aims to prove that these occurrences are indeed interrelated. Further, it will identify the most problematic aspects of cross-border displacement, and, thus, challenges which scholars and policy makers have to take into account in order to regulate this type of migration.

1.2. The linkage between climate change and cross-border displacement

The nature of the relationship between climate change and cross-border displacement is highly controversial. There are ongoing debates concerning the existence of the direct causal link between climate change and migration. The discussions centre on some uncertainties about the existence of environmental refugees, and thus around difficulties in the estimation of their numbers¹³. The position of those who question the linkage between climate change and migration comes from the problem of identifying whether the person has moved because of the climate change or because of the scanty conditions in general. For example, inhabitants of poorer regions with unstable economical situation, overwhelming unemployment and flourishing diseases might move in search of improvements and opportunities, but not on account of environmental vulnerability in the first instance¹⁴. Some researchers are even considering the use of the term ‘survival migration’,¹⁵ which includes a wide range of stress factors. However, it

¹⁰ EM-DAT: The OFDA/CRED International Disaster Database, Université Catholique de Louvain, Brussels, Belgium.

¹¹ Climate Change: The IPCC 1990 and 1992 Assessments, IPCC First Assessment Report, supra note 1, pg. 55.

¹² IOM, About migration, Facts and Figures, Global Estimates and Trends.

¹³ Migration and Climate Change, supra note 4, pg. 36.

¹⁴ Jane McAdam, Swimming against the tide: Why a Climate Change Displacement Treaty is not the Answer, Forthcoming in (2011) 23(1) International Journal of Refugee Law, pg.11.

¹⁵ Alexander Betts and Esra Kaytaz, National and International Responses to the Zimbabwean Exodus: Implications for the Refugee Protection Regime, New Issues in Refugee Research, Research Paper No 175, 2009, pg.1.

does not really address the problem of climate induced displacement or avoid the existing definitional gap, which will be observed in the second chapter.

The questioning of the cause-effect relationship between climate change and migration is becoming even more acute when it comes to a discussion of the legal aspects. The core concern includes the difficulties for the decision maker to assess the nature of the alleged harm feared, and the identification of whether the source of that harm is attributable to climate change. Lastly, the decision maker would need to assess whether that harm amounts to a violation of a human right, for which a protection response would be forthcoming¹⁶.

Before making any conclusions about the equity of these arguments, it is important to analyze what kind of impact climate change has on the people's lives.

According to the last report from the IPCC, humanity can expect the whole number of the severe consequences of the climate change.¹⁷ Some of those effects we can observe already, however the alarming rate of environmental change will sharpen them, and more than likely bring new ones. There is full consent among scientists that global temperatures will continue to rise through the following decades. The IPCC, which includes more than 1,300 scientists from the United States and other countries, forecasts a temperature rise of 2.5 to 5 degrees Fahrenheit (1 to 3 degrees Celsius) over the next century.¹⁸ Seemingly insignificant, such an increase can have beneficial impacts for some regions and harmful ones for others.

One of these effects is the sea-level rise. Low-lying areas and islands are threaten to be inundated, dense coastal populations are at risk of the loss of their original dwelling, shorelines would be eroded, property damaged and ecosystems such as wetlands that protect coasts against storms destroyed. During the 20th century, sea-levels rose about 15 cm due to melting glacier ice and the expansion of warmer seawater. Models predict that sea levels may rise as much as 59 cm during the 21st century, threatening coastal communities, wetlands, and coral reefs. Large delta systems are at particular risk of flooding.¹⁹ Furthermore, "the area of coastal wetlands is projected to decrease as a result of sea-level rise. For a high emissions scenario and high climate sensitivity, wetland loss could be as high as twenty-five percent and forty-two percent of the world's existing coastal wetlands by the 2050s and 2100s respectively. According to Nicholls and Lowe, using a mid-range climate sensitivity projection, the number of people flooded per year is expected to increase by between 10 and 25 million per year by the 2050's and between 40

¹⁶ Swimming against the tide: Why a Climate Change Displacement Treaty is not the Answer, pg.12

¹⁷ IPCC, Fourth Assessment Report: Climate Change 2007, Summary for Policymakers, in Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, UK, pg. 17.

¹⁸ Global Climate Change, Effects, The current and future consequences of global change.

¹⁹ Migration and Climate Change, supra note 4, pg.17.

and 140 million per year by 2100's, depending on the future emissions scenario".²⁰ Meanwhile, melting glaciers will increase the risk of flooding during the wet season, and reduce dry-season water supplies to one-sixth of the world's population, predominantly in the Indian sub-continent, parts of China, and the Andes.²¹ Around 100 million people worldwide live within three feet of sea-level. Sea-level rise and climate change could displace tens of millions of people in low-lying areas – especially in developing countries.²²

The change of rainfall patterns is another predictable effect. For some areas, this means that rain might be falling in deluges, destroying away top-soil and causing flooding. The change of rainfall patterns and a shift in hydrological cycle mean the increase in frequency and intensity of some extreme weather events such as droughts, storms, and floods. As it has been estimated, the South Asian monsoon will become stronger with up to twenty percent more rain falling on eastern India and Bangladesh by 2050. However, while mid-latitudes of the Northern Hemisphere become wetter, less rain is expected at low to mid-latitudes. For example, in Africa there is a general reduction in the amount of rainfall. Less rain would have particularly serious impacts on various sectors like agriculture, domestic set-ups, and industries which totally depend on water for their survival and growth²³. An increase in global temperature has also resulted in increased water evaporation, which puts a further strain on the availability of water. As the IPCC Working Group estimates, the yields from rain-fed agriculture could fall by up to fifty percent by 2020: "agricultural production, including access to food, in many African countries and regions is projected to be severely compromised by climate variability and change".²⁴ According to the same report, crop yields in central and south Asia could fall by thirty percent by the middle of the 21st century.²⁵

In addition to the above, climate change is predicted to have a negative effect on human health. As temperatures rise, so do the risks of heat-related illness, and even death, for the most vulnerable human populations. We have already been evidence of extreme heat waves in Europe and India. In addition to heat-related illness and deaths, climate change may increase the spread of infectious diseases, mainly because warmer temperatures allows disease-carrying insects, animals, and microbes to survive in areas where they were before threatened by cold weather. As

²⁰ Migration and Climate Change, *supra* note 4, pg. 17.

²¹ Stern Nicholas, *The Economics of Climate Change: The Stern Review*, Cambridge University Press, Cambridge, 2006, pg.56.

²² Alex de Sherbinin, Koko Warner and Charles Ehrhar, *Casualties of Climate Change: Sea-level Rises Could Displace Tens of Millions*, *Scientific American*, January 10, 2011.

²³ Migration and Climate Change, *supra* note 4, pg. 16.

²⁴ IPCC, *Fourth Assessment Report 2007*, *supra* note 3, pg. 10.

²⁵ *Ibid.*

the World Health Organization (WHO) estimates - climate change may have caused more than 150, 000 deaths in the year 2000 alone, with an increase in deaths likely in the future.²⁶

These are just some of the most significant effects of climate change, but there are much more, such as: economical loss, increasing number of the storms, land loss, and changing landscapes. In fact, all these factors are interrelated and with one another. It is possible to generalize that climate change will force population movements by making certain parts of the world unapt for living, by causing food and water supplies to become more unreliable, and increasing the frequency and severity of floods and storms.

According to the point of view of some scholars, the drivers of forced migration can be divided into two distinct groups: climatic and non-climatic drivers. Climatic drivers includes two types – climate processes and climate events. It can be said that the last sub-classification is based on the time length that the natural event takes. Thus, such phenomena as sea-level rise, salinization of agricultural land, desertification, growing water scarcity, and food insecurity are attributed to climate processes. Sea-level rise patently makes certain coastal areas and small island states uninhabitable. Cumulatively, it erodes livelihoods, and changes the incentive to stick it out in a particular location²⁷.

For example, Northern Africa, as the most water-stressed sub-region of Africa has already suffered from the freshwater availability, and, according to projections, will become an even more important issue in the coming decades. Climate change scenarios for western Maghreb predict a “rise in temperature of up to 4 degrees Celsius this century, accompanied by a reduction in rainfall of up to 20 twenty percent. This would result in decreased soil moisture, and reduced surface and groundwater resources. The salinisation of soil, which threatens food production, is already a concern in irrigated areas, especially along the river Nile, and may worsen”.²⁸

However, apart from the serious implications on the regional level, on a national level sea-level rise could have even vaster consequences, especially for countries that have a large part of their industrial capacity under the one meter zone. Bangladesh’s Gangetic plain and the Nile Delta in Egypt, which are breadbaskets for both countries, are two such examples²⁹. “Egypt’s Nile Delta is one of the most densely populated areas of the world and is extremely vulnerable to sea-level rise. A rise of just one meter would displace at least 6 million people, and flood 4,500 km² of farmland”.³⁰

²⁶ World Health Organization, WHO, Climate and health, Fact sheet, July 2005.

²⁷ Migration and Climate Change, supra note 4, pg.17.

²⁸ Eric O. Odada, Our Freshwater Under Threat – Vulnerability of Water Resources to Environmental Change in Africa, AfricanNESS Secretariat, University of Nairobi, Nairobi, Kenya, pg.3.

²⁹ Migration and Climate Change, supra note 4, pg.18.

³⁰ Ibid, pg.16.

Climate events are different in a sense that they are sudden and dramatic hazards such as monsoon, floods, glacial lake outburst floods, storms, hurricanes, and typhoons. The peculiarity of this category of natural events is swiftness, which makes people leave their land much more quickly and dramatically.³¹ The Sumatra earthquake and tsunami, which took place in October 2010, is one of the recent examples of such climate events. The tsunami caused widespread destruction, which displaced more than 20, 000 people and affected about 4, 000 households. 435 people were reported to have been killed, with over 100 more still missing.³²

It has been shown that both climate processes and climate events have a horrific impact on the regional and global level. However, different countries and communities have very different adaptive capacities, thus the effect of the same natural disasters can greatly vary due to the region in which it takes place. Adaptive capacity can be described as “[t]he ability of a system to adjust to climate change (including climate variability and extremes) to moderate potential damages, to take advantage of opportunities or to cope with the consequences”.³³

These different adaptive and disaster resilience capacities can be observed using the examples of Bangladesh and the United States. In April 1991, tropical cyclone Gorky hit the Chittagong district of south-eastern Bangladesh. Winds of up to 260 kilometers per hour and a six-meter high storm surge battered much of the country, killing at least 138, 000 people, and leaving as many as 10 million people homeless.³⁴ Next year, in August 1992, a stronger storm, the category five Hurricane Andrew, hit Florida and Louisiana with winds of 280 kilometers per hour and a 5.2 meter storm surge. However, while it left US 43 billion in damages in its wake, it caused only sixty-five deaths³⁵.

For these reasons, the low income developing countries with weak chances for adaptation would be the first to relocate. Even though, the adaptive capacities of different countries vary accordingly to the social, economic and technological level – climate change will challenge everyone’s ability to adapt. Ultimately, there would be a point when people will be forced to migrate to areas that present better opportunities.

Returning to the debate concerning the link between climate change and migration, it seems more reasonable to stand on the position that there is a cause-effect relation between these occurrences. First of all, the facts and statistical data, which have been previously analyzed, show that there is an apparent correlation between the climate change rate and the growing

³¹ Migration and Climate Change, *supra* note 4, pg.18.

³² Death Toll From Indonesian Disasters Tops 400, Asia-Pacific, retrieved 29 October 2010.

³³ Richard J.T. Klein, Climate Change, Adaptive Capacity and Sustainable Development, OECD Informal Expert Meeting on Development and Climate Change, Paris, France, 13–14 March 2002, pg. 3.

³⁴ National Oceanic and Atmospheric Administration, NOAA’s top global weather, water and climate events of the 20th Century, 20 April 2007.

³⁵ Migration and Climate Change, *supra* note 4, pg.19.

amount of the natural phenomena that forces people to migrate. The threat of climate change is recognized, and there is an agreement between scientists on the fact that certain areas would be completely wiped off the face of the earth or would become unsuitable for living. This would leave no other choice for inhabitants except searching for new places to settle down. Secondly, even though it might be difficult to identify the core cause of the migration in the first place, it does not mean that this category of migrants should be underestimated. The very nature of climate change effects is multifaceted, and impacts of climate change are going beyond the environmental context. It seems logical that in this case, the difference between the forcing factors is more definitional than practical. It does not matter what was the last straw for each single individual which forced him or her to move from the area affected by climate change. However you name it - the search for better conditions or new opportunities - it still does not sound like a whim of those people, considering the living conditions in these areas. Ultimately, most of the non-climatic drivers for migration in regions threatened by the climate change are still related. Let us take, for instance, unemployment in a sea-bordered region affected by constant floods or tsunamis. The loss of crops yields, migration of fish, and other accompanying phenomena will make it harder for a man to obtain a livelihood; this will create shortness in natural resources, men tied to agriculture will lose their only source of income, thus becoming unemployed and being forced to move elsewhere in order to satisfy their needs. This scheme might sound primitive, but the point is that the search for an original forcing factor should not be the focus of attention; what deserves consideration is that there is no mechanism for the protection of the people induced for cross-border displacement and that concerted actions should be taken.

However there are a number of difficulties concerning cross-border displacement which hamper the process of finding a suitable protection mechanism. The next section gives an analysis of the most significant problems which occur in the case of cross-border migration.

1.3. Problems that arise in the case of the cross-border migration

The findings and assessed facts of the previous section have shown that in the forthcoming future, - people affected by climate change in its most extreme forms, would have to search for new places abroad to settle down. At this stage, a lot of problems could arise due to the difficult nature of cross-border migration; some of these occurrences are already taking place in affected areas. Thus, in this section, the impacts of cross-border displacement on the political, social, economic and legal levels will be assessed. The analysis of these delicate issues is highly important for the effective protection of climate change victims. The most important thing that

should be bore in mind, while overlooking the existing and potential legal mechanisms, is that the interests of both sides, migrants and receiving areas, should be taken into account.

1.3.1. Political problems

The difficulty on the political level follows from the fact that “States presently seem to lack the political will to negotiate a new instrument requiring them to provide international protection to additional groups of people”.³⁶ The category of environmental refugee is not yet recognized in international law; therefore, it is not totally clear who is responsible for the protection of climate induced migrants. This issue will be deeply analyzed in the second chapter of this thesis. For the purpose of this section, in order to show what are the specific problems related to cross-border displacement, just a brief overview of the current situation will be given.

As a general rule, people who move voluntarily, or who are forced to move across an international border, are entitled to all of their fundamental human rights guarantees for the protection of human dignity.³⁷ “These include civil, political, economic, social, and cultural rights such as: the right of freedom of movement; to choose their place of residence; to engage in religion or cultural practice; the right to life, privacy, and health; the right to seek employment; and the right not to be discriminated. However, this does not include a right to enter another country, to work or remain there, or to receive the same legal protection as a refugee under international law”.³⁸ This poses a serious problem in the case of cross-border migration. Disaster victims lack an occurrence which would be responsible for their protection.

As McAdam exemplifies in her research, “an individual State might perceive a need to respond to potential arrivals of people displaced by climate change, but be unwilling to unilaterally create legal avenues for their protection. Were it to elicit the support of other States in adopting a treaty, its humanitarian impulse could be coupled with mutual self-interest, in that it could call on other States to share the responsibility of caring for such people”.³⁹

This example demonstrates the present situation of cross-border displacement. The receiving areas, often struggling to serve the interests of their own citizens, are not willing to take on any extra obligations. This is understandable in most cases, especially when the receiving country is poor and lacks the capacity to deal with the inflow of immigrants. Thus, the mechanism for the protection of the peoples induced for cross-border displacement by the impacts of climate change would clarify the responsible institutions. As it has been stated above, the interests of residents of the receiving area should not be underestimated.

³⁶ Swimming against the tide: Why a Climate Change Displacement Treaty is not the Answer, supra note 14, pg. 12.

³⁷ General Comments and UN Fact Sheets, UN Fact Sheets, No. 20 Human Rights and Refugees.

³⁸ Michelle Leighton, Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons, Study Team on Climate-Induced Migration, June, 2010, pg. 3.

³⁹ Swimming against the tide: Why a Climate Change Displacement Treaty is not the Answer, supra note 14, pg. 13.

1.3.2. Economic problems

The economic consequences of climate change have been modeled by many researchers. The well-known Stern Review cites an estimate that by the middle of the century, 200 million people may become permanently displaced climate refugees due to rising sea-levels, heavier floods, and more intense droughts.⁴⁰ The Stern Review gives a deep analysis of the processes which would occur and the impacts it would have on the world's economy. In brief, Stern warns that climate change risks will cause economic consequences "on a scale similar to those associated with the great wars and the economic depression of the first half of the 20th century".⁴¹

The predicted sea-level rise is considered to be the first and most obvious way which climate change will affect the economy. According to the Organization for Economic Cooperation and Development (OECD), economic damages and losses arising from climatic destabilization could cost the global economy up to 970 billion dollars.⁴² Concerning cross-border migration, it has been recognized that the growing hordes of refugees will undoubtedly further affect the economy. As state services will become overwhelmed by a vast population of destitute people in the cities, the number of crimes and conflicts might increase, and the receiving states will go deep into economic crises. This especially applies to low-income and middle-income countries with unstable economies and a lack of technologies and capacities to deal with cross-border migrants.

Cross-border migration can be divided into several main stages. The first stage is pre-migration. On this stage, actions to prevent, mitigate and help individuals to adapt to environmental hazards take place. Migration itself is the second stage of the cycle: this phase requires short-distance or long-distance movement, with the significant costs of displacement, which probably would be beyond the victims' means. The third stage of the cycle involves settlement in another location: this demands an increasing workload in emigrational and governmental structure, and the management of the costs of settlement, including social services, and other resources which would ensure decent living conditions and pursuance of an adequate livelihood. The final stage of cross-border migration is integration into the new home or location⁴³. It can be concluded that each phase would require colossal financial aides and corresponding strategies. It is widely understood that the developing countries, which would have to relocate their citizens, would need the assistance of the international community. Thus, a

⁴⁰ The Economics of Climate Change: The Stern Review, supra note 21, pg. 56.

⁴¹ Ibid, p. 572.

⁴² Lester Brown, The State of the World 1998 Worldwatch, A Worldwatch Institute Report on Progress Toward Sustainable Society, Washington DC 1998, pg. (3).

⁴³ Susan F Martin, Climate change and International migration, The German Marshall Fund of the United States, June 2010, pg. 2.

protection strategy should identify the financial sources for managing the impacts of climate change, and comply with the demands of the migrants induced by it.

1.3.3. Social problems

On the social level, one of the more serious concerns is that environmentally induced migration may lead to a growing number of conflicts and violence. As it has been observed, reduced resources for livelihood - such as food or water, loss of land and other climate change impacts - will push people out of uninhabitable areas to the neighboring country. If the territory of the receiving state is also resource constrained it could raise the level of violence, as people become embroiled in conflicts over the remaining livelihoods.

Currently, the link between climate change induced displacement and conflicts might be small, but future climate change can make environmental stress a more substantively significant predictor of violence.⁴⁴ Already in 2001, the IPCC suggested a “potential for international conflict over water resources” where reduced availability may induce conflict between different users. The report specifically refers to reduced water availability in the semi-arid savannah ecosystems of tropical Africa, exacerbating conflicts between herdsman and farmers. The report also notes the same potential arising from the depletion of fish stocks, which, like water, are an important trans-border economic resource in many countries.⁴⁵

Take northern Kenya, for example, which is suffering from droughts and lack of water resources. There have always been tensions and conflicts between the Turkana and neighboring pastoralist groups for access to water and pasture in northern Kenya. As a result of the changing climate, droughts have become more frequent and more prolonged, thus the number of conflicts is expected to increase.⁴⁶

Another example is South Asia, which is instead affected by floods, cyclones, and soil degradation. The Chittagong Hill tribes in Bangladesh have been involved in violent conflicts with the state over the influx of Bengalis from the plains, whom they view as a threat. Bengali migration to the north-east Indian region of Assam has also contributed to social frictions. Increased migration rates can further fuel social tensions in these regions, particularly as Bangladesh is a frequently mentioned victim of future sea-level rise and vast population dislocation.⁴⁷ Recently, “in September 2010, the Bangladeshi Prime Minister Sheikh Hasina,

⁴⁴ Nils Petter Gleditsch, Ragnhild Nordås and Idean Salehyan, *Climate Change and Conflict: The Migration Link*, International Peace Academy, May, 2007, pg. 5.

⁴⁵ *Climate Change 2001, Impacts, Adaptation and Vulnerability*, IPCC Third Assessment Report, Intergovernmental Panel on Climate Change & Cambridge, Cambridge University Press, 2001.

⁴⁶ John Magrath, Programme Researcher, Oxfam GB, *Climate change impacts on development. A note of Oxfam's experiences for the Stern Review*, pg. 8.

⁴⁷ *Climate Change and Conflict: The Migration Link*, supra note 43, pg. 5.

warned that the mass movement of up to one billion climate change migrants, including 30 million in Bangladesh, would cause social disorders, political instability, cross-border conflicts, and upheavals, unless there was multilateral action to fund adaptation and rehabilitate those affected".⁴⁸

It has to be taken into account that geographical climate change would first affect developing countries. Since people living in vulnerable areas are often very poor, they typically lack the resources to move long distances, and they do not have support networks in other countries to assist them on arrival.⁴⁹ Therefore, they are more likely to relocate to the cross-border countries, to the regions which are also at risk of climate change. These regions usually have limited capacity to regulate the influx and struggle to handle the challenges that occur once refugees settle within their borders.

The linkage between cross-border migration and the growing number of conflicts is strengthened by the social difficulties for migrants to adapt in the new area. Citizens of receiving countries often view migrants as a threat to their lifestyle. Migrants are seen as strangers who pose a threat to the natives' economic comfort, culture, and opportunities. Their background and the circumstances which force them to relocate are often disregarded. Climate induced migrants often have physical and psychological trauma;⁵⁰ they have lost their houses, the places to which they have been historically and emotionally attached, and, after all, they are not welcomed into the new area. Thus, the receiving country would go through significant difficulties. Local governments would have to regulate these tensions; they would have to be equipped with the capacity to deal with the needs of both: their own citizens and international migrants.

1.4. Conclusion

The observations show that the threat of climate change is recognized and scientists are in agreement that some areas will become completely unsuitable for living as a result. Thus, even though the link between climate change and cross-border displacement is under active debate, the current chapter has shown that such a category as cross-border climate induced migrant does in fact exist. It has been shown that cross-border movement has specific problems that are conditional because of the nature of this kind of migration; namely, the vulnerability of people induced to displacement, the problems of their treatment by the receiving areas, the gaps in legal regulation, and non-identified sources for financing. All these political, economic and social

⁴⁸ Jane McAdam and Ben Saul, *Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh*, Sydney Law School, Legal Studies Research Paper No. 10/113, November 2010, pg. 12.

⁴⁹ *Ibid.*

⁵⁰ Miles Joseph Rutkowski, *Bangladeshi Immigration and the Farakka Barrage: A Difference-in-difference Analysis*, Stanford University, June 2010, pg.4.

difficulties, which arise in the case of cross-border displacement, will be taken into account in the following section of this thesis during the analysis and assessment of the suitability of existing and potential protection mechanisms.

2. The 1951 Convention relating to the Status of Refugees

2.1. Introduction

As it was mentioned in the previous chapter, the category of environmental refugees is relatively new, and is not fully recognized by scholars on the international legal level. However, due to the rapid growth of the number of people displaced by climate change, there is an obvious need to regulate the flow of cross-border refugees induced for relocation by climate change. In general, refugee law encompasses customary law, peremptory norms, and international legal instruments. On the international level, the only existing instrument is the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention), with one Optional Protocol.⁵¹ This section gives a general overview of the Refugee Convention, with a close analysis of the legal definition of refugee. Further, it investigates the term environmental refugee and provides evidences that the category of environmental refugees does not fall under the scope of the Refugee Convention. The main focus of the current analysis is the existing obstacles in the application of the Refugee Convention for the protection of people induced for migration by climate change.

2.2. The overview of the 1951 Refugee Convention

The 1951 United Nations Convention relating to Status of Refugees, which was modified and updated by a Protocol adopted in 1967, is the “central feature in today’s international regime of refugee protection”⁵². The convention was approved at a special United Nations conference on 28 July 1951. It entered into force on 22 April 1954, and is by far the most widely ratified refugee treaty. Additionally, it remains central to the protection activities of the United Nations High Commissioner for Refugees (UNHCR). According to the data base of UNHCR (as of 1 October 2008) 147 States (out of a total United Nations membership of 192) have now ratified either one or both of these instruments.⁵³

⁵¹ Convention relating to the Status of Refugees, 28 July 1951, UNCP, Art.1A(2).

⁵² Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees Protocol relating to the Status of Refugees*, United Nations 2008, pg.1. available at: <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>

⁵³ States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, UNHCR, United Nations High Commissioner for Refugees.

The amount of refugees and displaced persons during and after the Second World War has shown the necessity for adopting a mechanism for regulation. In 1946, during the first session of United Nations General Assembly, it was recognized that the problem is a matter of great urgency. Furthermore, during this session, Resolution 8(1) was adopted, which outlined the guiding principles for future steps: “no refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts, including adequate information from the government of their countries of origin, expressed valid objections to returning to their countries of origin ... shall be compelled to return to their country of origin.”⁵⁴ As a response for this call on 20 April 1946, the United Nations created the International Refugee Organization (IRO). IRO was a specialized agency of the United Nations with the mandate to assist refugees and displaced persons. Even though it was successful in providing protection and assisting refugees, there were a number of shortcomings in its work: namely, the operation of the agency was too expensive, and was largely affected by the politics of the Cold War. Therefore, it was decided to replace it with a temporary and initially non-operational agency, and as a complement to the new institution, the new treaty concerning the status of refugees was adopted.⁵⁵

The definition of refugee under the Refugee Convention shows that it was strongly influenced by World War II. It mainly focuses on persons who are outside their country of origin and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951. As a result of the new refugee crises that emerged during the late 1950's and early 1960's, it became necessary to widen both the temporal and geographical scope of the Refugee Convention. Thus, the 1967 Refugee Protocol to the Convention was drafted and adopted.⁵⁶ The accession to the Protocol meant that States agree to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. The vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.⁵⁷

The major goal of the Refugee Convention and the Protocol is to strive for equal treatment of refugees and other aliens in such areas as the rights relating to movable and immovable property (Article 13), association (Article 15), gainful employment (Articles 17 and 18), housing (Article 21), and education, other than elementary (Article 26). An even more important goal of the Refugee Convention is to strive for the equal treatment of refugees and the nationals of the

⁵⁴ Resolution 8(1) of General Assembly on the Question of refugees, adopted on 12 February 1946.

⁵⁵ Convention Relating to the Status of Refugees Protocol relating to the Status of Refugees, *supra* note 51, pg.1.

⁵⁶ Refugee Protection, International Organization for Migration.

⁵⁷ Kate Jastram and Marilyn Achiron, UNHCR, Refugee Protection: The Guide to International Refugee Law, 2001, pg.10, available at: http://www.ipu.org/pdf/publications/refugee_en.pdf

host country in such areas as the rights relating to religion (Article 4), artistic and industrial property (Article 14), elementary education (Article 22(1)), public relief (Article 23), rationing (Article 20), access to courts (Article 16) and social security (Article 24). The ultimate goal is for refugees to become assimilated and naturalized as citizens of the host country.⁵⁸

However, despite its best intentions, the Refugee Convention currently lacks the adequacy to assist the interests of all peoples induced for cross-border displacement. The contemporary challenges are going beyond the scope of the Refugee Convention, and raise a number of debates concerning their regulation. Climate change brings the new category of refugees, such as environmental or climate refugees, and their protection is very much perplexed. One of the problems is that the 1951 Refugee Convention, adopted more than fifty years ago, was not drafted with such persons in mind.⁵⁹ To analyze this issue, a closer look at the category refugee, as defined by the Refugee Convention, and the terms environmental or climate refugees will be taken; it will help to answer the question why climate change refugees do not fall under conventional regulations.

2.3. Refugee definition under the Refugee Convention

According to Article 1A, paragraph (1) of the 1951 Refugee Convention, the term refugee applies to any person considered a refugee under previous international arrangements. Article 1A, paragraph (2), as modified by the 1967 Protocol, defines refugee as any person who: “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; 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”⁶⁰. Here it is suitable to note that stateless persons may also be refugees. In this case, the country of origin (citizenship) is understood as the “country of former habitual residence”.⁶¹ However, as paragraph (102) of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR) states: “not all stateless persons are refugees. They must be outside their country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee”.⁶²

⁵⁸ Luke T. Lee, The Refugee Convention and Internally Displaced Persons, *International Journal of Refugee Law*, Vol. 13 No. 3, 2002, pg. 364.

⁵⁹ Ritumbra Manuvie, *Climate Change Victimization: Relooking the Refugee Convention*, pg. 3.

⁶⁰ Convention Relating to the Status of Refugees, *supra* note 50, Art. 1A(2).

⁶¹ Convention Relating to the Status of Refugees Protocol relating to the Status of Refugees, *supra* note 51, pg. 1.

⁶² Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, pg. 38.

For a sufficient analysis of the following conventional definition, the core characteristics of the term refugee should be determined.

First of all, the refugee must be outside his or her country of origin. The fact that a person has actually fled and crossed an international frontier plays a crucial role in determining whether they qualify as a refugee.⁶³ Furthermore, this characteristic allows for drawing a line between refugee and internally displaced people (IDP). IDP are the subject of a totally different legal mechanism. Namely, they should receive a protection in accordance with the 1998 Guiding Principles on Internal Displacement.⁶⁴ IDP are defined by the UNHCR in paragraph (2) of the Guiding Principles on Internal Displacement as: “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”.⁶⁵ This definition clearly encapsulates the concept of environmental refugees to the extent where displacement occurs internally. Although IDP presents another big challenge in international law, the core concern of this thesis is the cross-border refugees. Still, the difference in these notions and instruments for the protection of these groups should be bore in mind for the purposes of the third chapter, which will aim to search for possible effective solutions for effective protection of environmental refugees.

The second important characteristic lies in the phrase: “well-founded fear of being persecuted”⁶⁶. The term “well-founded fear” contains two elements: a subjective and an objective; both of them must be considered in order to determine a refugee status. Fear, as a subjective element can be defined as a state of mind, and, thus, in most cases it requires the assessment of the personality and credibility of the applicant.⁶⁷ To the element of fear is added the qualification well-founded. This implies that, to obtain refugee status, not only the frame of mind of the person concerned must be taken into account, but that this frame of mind must be supported by an objective situation as well.⁶⁸

The third significant element in the refugee definition, and the most contradictory one in the context of the current research, is persecution. This means that the well-founded fear must be related to the persecution. However, the risk of persecution is essential to the refugee definition:

⁶³ Convention Relating to the Status of Refugees Protocol relating to the Status of Refugees, *supra* note 51, pg. 3.

⁶⁴ Guiding Principles on Internal Displacement, 11 February 1998, UN Doc. E/CN.4/1998/53/Add.2, UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39.

⁶⁵ *Ibid.*

⁶⁶ Convention relating to the Status of Refugees, *supra* note 50, Art. 1A(2).

⁶⁷ Determination of Refugee Status, 1989 UNHCR, Training Service, Case Postale 2500 CH1211 Geneva 2 Dépôt, pg. 6.

⁶⁸ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, *supra* note 61, pg. 34.

there is no universally accepted definition of persecution. From Article 33 of the Refugee Convention, it may be inferred that a threat to life or freedom for the reasons of race, religion, nationality, political opinion, or membership of a particular social group is always persecution.⁶⁹ This list of the grounds for persecution is closed, as it will be observed further. Thus, when it comes to the protection of environmental refugees, a number of reasonable difficulties arise. However, before going to the profound analysis of those obstacles, the terms of environmental and climate refugee should be assessed. This will provide the reader with a good and indispensable perspective on the most significant characteristics of environmentally displaced persons.

2.4. Definition of environmentally displaced people

The terms climate refugee and environmental refugee are widely used in the current debates on climate change. According to some claims, there will be hundreds of millions of climate or environmental refugees within a few decades.⁷⁰ Even though, as it will be analyzed, persons displaced by environmental disasters do not fall directly under the international legal definition of refugee.⁷¹ However, attempts to describe this category of people should not be underestimated: they play an important and controversial role at the same time. They are important, because they whip up the process of searching for suitable regulation instruments, and controversial because, as it will be shown, the use of the term refugee in cases of environmentally displaced people contradicts the definition of refugee as laid down in the Refugee Convention.

The qualification of environmentally displaced people as climate or environmental refugees should not be considered just a mere vocabulary issue. More than that, “it reflects an easily perceivable analogy and, in some cases, an argumentative posture based on this analogy”.⁷² Some scholars, for example, claim that “[t]here is nothing inherent in the ordinary meaning of the word ‘refugee’ that would suggest that the people fleeing flooded homes . . . should not be considered as refugees.”⁷³ This is explained by the fact that both political refugees and climate migrants are usually fleeing a place where their safety is no longer ensured. The forced character of displacement can be thus considered as the main difference between political refugees and

⁶⁹ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, *supra* note 61, pg. 34

⁷⁰ Robert McLeman, Climate change, migration and critical international security considerations, 2011 International Organization for Migration, No 42, University of Ottawa, Canada, pg.11.

⁷¹ Kara K. Moberg, Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection, pg. 1114.

⁷² Benoit Mayer, The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework, Colorado Journal of International Environmental Law and Policy, Vol. 22, No. 3, 2011, pg.27.

⁷³ Maria Stavropoulou, Drowned in Definitions?, Forced Migration Review 31, 2008, pg. 12.

“ordinary” migrants.⁷⁴ In this sense, the inference can be made that climate migrants, in a number of characteristics, are closer to political refugees, than to ordinary migrants. Ordinary migrants are more likely to relocate in search of better conditions. While climate migrants usually endure the infringement of their core fundamental rights, in particular their right to life, right to adequate food and water, right to housing, and others.

Essam El-Hinnawi, a Professor of the National Research Centre in Cairo, was the first one who used the term environmental refugee in the above mentioned 1985 UNEP Handbook. Under his definition, environmental refugees defined as: “People who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by man) that jeopardized their existence and/or seriously affected the quality of their life”⁷⁵. By the use of environmental disruption in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that renders it, temporarily or permanently, unsuitable to support human life.⁷⁶

Even though El-Hinnawi’s definition of environmental refugees was created more than twenty years ago, it remains the most quoted for a number of reasons. First, it confirms that environmental degradation is one of the reasons people relocate, along with wars and social conflicts. Second, the definition includes triggered by man ecological disruptions and brings attention and helps identify those who are responsible for these changes. Lastly, the definition does not specify that one should leave his or her country in order to be recognized as an environmental refugee. Therefore, it allows claims that crossing international borders is not a must to be assisted and protected by international law and treaties.⁷⁷

El-Hinnawi in his report distinguished three major types of environmental refugees.

First of all, people who are temporarily dislocated due to disasters, whether natural or anthropogenic. The significant feature of this group is the ability to return to their habitats, once the environmental disruption is over and it is safe to return.⁷⁸ An example of this is the 2004 Indian Ocean tsunami, which was the result of the strong earthquake. The aftereffect of this disaster for Banda Aceh was the displacement of 412 ,000 people due to the loss of shelter, land, and income.⁷⁹

⁷⁴ The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework, *supra* note 71, pg. 27.

⁷⁵ Essam ElHinnawi, The Environmental impacts of production and use of energy, United Nations Environmental Programme, 1981, pg.4.

⁷⁶ Diane C. Bates, Environmental Refugees? Classifying Human Migrations Caused by Environmental Change, *Population and Environment*, Vol. 23, No. 5, May 2002, pg. 466.

⁷⁷ Emmanuel K. Boon and Tran Le Tra, Are Environmental Refugees Refused? *Stud. Tribes Tribals*, 5(2), 2007, Human Ecology Department, pg. 87.

⁷⁸ Robert Brears, Environmental refugees from the Maldives: Are they protected? pg. 8.

⁷⁹ UNEP After the Tsunami: Rapid Environmental Assessment, 2005, pg.10.

The second group is the people who have been permanently displaced due to drastic environmental changes, such as the construction of dams. For example, in China, during the construction of the Three Gorges Dam, more than 850,000 people were displaced.⁸⁰ If the future prognosis comes true, we can expect some 200 million permanently displaced climate refugees by 2050.⁸¹

Finally, the third type is the people who migrate based on the gradual deterioration of environmental conditions. The last category seems highly problematic. First of all, in this case, cause and effect questions arise. The controversial link between climate change and migration was observed in the first chapter. Second, the length of this process makes it hard to distinguish if the relocation is a dire necessity. In this sense, it is hard to assess if the fear is well-founded. Furthermore, as El-Hinnawi fairly points out, a major complication with environmental degradation is that people are both the origins and victims of these problems.⁸²

The following attempts to define environmentally displaced peoples grounded on the idea to characterize environmental refugees based upon factors such as the specific environmental reasons for relocation (deforestation, rising sea levels, land degradation, water scarcity, and so on), the duration of migration (temporary, long term, permanent), the distinction between natural and man-made provocation (degradation of natural resources, industrial accidents, war and conflict, and climate change), and migration in relation to state borders (internal or trans-boundary movements)⁸³. However, this might be too specific, and make classification cumbersome and confusing. In contrast, a broader definition was suggested by Myers and Kent in 2005. They suggested that environmental refugees are “persons who no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of unusual scope”.⁸⁴ This definition raises totally opposite concerns. First of all, the scope of the factors which force people to relocate is not precisely outlined. Secondly, it is not clear what is the substance of the term secure livelihood. Particularly in cases with developing countries, where the livelihoods are naturally poor and weather conditions constantly severe, this definition can provoke a wave of claims for recognition as a refugee.

This range of varied interpretations and considerations of different factors highlights many of the key challenges for the characterization and implementation of the concept of

⁸⁰ Environmental Refugees? Classifying Human Migrations Caused by Environmental Change, *supra* note 75, pg. 472.

⁸¹ The Economics of Climate Change: The Stern Review, *supra* note 21, pg. 56.

⁸² Are Environmental Refugees Refused? *supra* note 76, pg. 90.

⁸³ Angela Williams, Turning the Tide: Recognizing Climate Change Refugees in International Law, *Law & Policy*, Vol. 30, No. 4, October 2008, pg. 507.

⁸⁴ Norman Myers, Environmental Refugees: an Emergent security issue, 13th Economic Forum, Prague, 23-27 May 2005, pg.1.

environmental refugees.⁸⁵ As has been mentioned by the use of the term environmental refugee or climate refugee is highly controversial: “even though, it provides a useful descriptor of displacement, it does not accurately reflect in legal terms the status of those who move. Politically and legally, it is provocative, but also reflects the law’s inadequate response to dealing with displacement of this kind”.⁸⁶ The following section will provide evidence that, in spite of the existence and spread use of the term environmental refugee, international law currently does not recognize environmentally displaced people.

2.5. Obstacles in applying the Refugee Convention for the protection of environmentally displaced peoples

It was observed above that international law has a mechanism for the protection of displaced populations, namely the Refugee Convention. However, as it will be argued in this section, this protection does not extend to environmentally displaced people. For the purpose of clearer analysis the definition of refugee under the Refugee Convention and Protocol needs to be recalled. The Convention states that the refugee status extends only to persons outside their country of origin, persons who are unwilling or unable to receive protection from their country of origin or to return to their country of origin, persons faced with a well-founded fear of being persecuted in their country of origin, or that persecution is based on reasons of race, religion, nationality, membership of a particular social group or political opinion.⁸⁷ All these requirements have to be met in order to gain refugee status.

In 1979, the United Nations High Commissioner for Refugees (“UNHCR”) produced the UNHCR Handbook, which was already mentioned above, as a guide for governments and courts to determine who qualifies as a refugee. The interpretation of the refugee definition by the UNHCR excludes victims of natural disasters and rules them out from acquiring refugee status.⁸⁸ This causes a lot of confusion for scholars, lawyers, and governments. It was analyzed in the previous section that a lot of academics call persons displaced by environmental circumstances environmental refugees, and try therefore to apply refugee law.⁸⁹ Nevertheless, there are a number of significant difficulties in qualifying environmentally displaced persons as refugees under international law.

⁸⁵ Turning the Tide: Recognizing Climate Change Refugees in International Law, *supra* note 82, pg. 507.

⁸⁶ Jane McAdam, Climate Change ‘Refugees’ and International Law, NSW Bar Association, 24 October 2007, pg. 5.

⁸⁷ Convention relating to the Status of Refugees, *supra* note 50, Art. 1A(2).

⁸⁸ Jeanhee Hong, Note, Refugees of the 21st Century: Environmental Injustice, Cornell University Law School, Volume 10, Number 2, Spring 2001, pg. 330.

⁸⁹ Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection, *supra* note 70, pg. 1114.

2.5.1. Persecution

In the case of cross-border movement, the central obstacle in locating environmental displacement within the framework of international refugee law is the difficulty in characterizing natural disasters as persecution. Rising sea-levels, salination, and increasingly frequent storms, earthquakes and floods may be harmful, but they do not constitute persecution in accordance with the meaning which has been ascribed in international and domestic law.⁹⁰

The UNHCR Handbook, which is undoubtedly the most authoritative interpretation of the 1951 Refugee Convention and the 1967 Refugee Protocol, affirms that “[t]here is no universally accepted definition of ‘persecution’, and various attempts to formulate such a definition have [been] met with little success.”⁹¹ It causes a lot of confusions, but, on the other hand, it means that there is no direct impediment for considering environmental harm as persecutory according to the provisions of the Handbook.⁹²

According to the UNHCR “persecution is normally related to action by the authorities of a country”.⁹³ In other words, if one is searching for recognition as a refugee because of environmental impairment, the cause-effect relationship between environmental consequences and governmental actions should be established. However, the environmental disruption is not always a direct result from human activities.⁹⁴ This implies that, for most of environmentally displaced people, there would be no difficulty to prove that they suffered a sufficient level of harm - especially if one considers the existing conditions in developing countries, and the fact that they are affected by climate change more than anyone else. Insurmountable obstacles arise from the source-of-persecution requirement that “the cause of the harm [be] either the government or a person or group of persons that the government is unwilling or unable to prevent from continuing the persecution”.⁹⁵

Nevertheless, the UNHCR Handbook does not directly prevent victims of human-made environmental impairment from receiving refugee status. On the contrary, “the fact that the direct harm inflicted is on the environment rather than on the individual should not change the

⁹⁰ Jane McAdam and Ben Saul, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*, Sydney Centre for International Law, Faculty of Law, University of Sydney, Working paper 4, pg. 9.

⁹¹ *Refugees of the 21st Century: Environmental Injustice*, supra note 87, pg. 330.

⁹² *The International Legal Challenges of Climate Induced Migration*, supra note 71, pg.27.

⁹³ European Council on Refugees and Exiles, *Recommendations on the Treatment of Algerian Refugees and Asylum Seekers in Europe*, 1 June 1995.

⁹⁴ Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, *Environmental Law*, Vol. 37:365, 2007, pg. 378.

⁹⁵ *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, supra note 71, pg. 1114.

fact that such harm is persecution.”⁹⁶ Undoubtedly, serious natural crises will have a negative effect on the human life, health, and freedom. Therefore “[e]nvironmental harm is as capable of being a means of persecution as any other form of harm.”⁹⁷

As Christopher Kozoll stresses, “[t]o establish that flight based on environmental harm is indeed flight based on well-founded fear of persecution, an individual will have to show more than a generalized environmental degradation.”⁹⁸ This means that there has to be sufficient evidence that environmental harm is severe. An individual has to prove that his fundamental human rights are threatened by these environmental processes. Additionally, “for the persecution to be individualized, the environmental harm must affect the individual in his capacity as a member of a protected category to a greater degree than other persons.”⁹⁹

Second, in order to establish persecution there has to be a correlation between persecutory impact and persecutory intent on the part of the governmental entity. It should be emphasized that intent requires more than a volition or awareness of consequences. Thus, the government must have been negligent or inactive because of, and not merely in spite of its adverse effects upon an identifiable group.¹⁰⁰

There are a number of examples where we can acknowledge environmental harm as prosecution. For instance, the desertification of the African Sahel, where it is claimed the governments of the Sahel region “could have enacted policies and programs to cut population growth, to improve agricultural techniques, or to heighten food production.”¹⁰¹ Another suggested example is the Chernobyl, where the impacts of disaster were deteriorated by the Soviet government’s delayed response and apparent disregard to safety and environmental considerations in the country’s quest for nuclear power.¹⁰² Nevertheless, the fact that we can find correlation between environmental harm and persecution is not sufficient to apply the Refugee Convention. There are other requirements that have to be met.

2.5.2. Grounds of the persecution

The second obstacle for the protection of environmentally displaced people that the refugee definition contains is the fact that persecution must be based on certain grounds. As it is

⁹⁶ Christopher Kozoll, *Poisoning the Well: Persecution, the Environment, and Refugee Status*, *Colorado Journal of International Environmental Law and Policy*, Vol. 15:2, 2004, pg. 274.

⁹⁷ *Ibid.*, pg. 297.

⁹⁸ *Ibid.*, pg. 284.

⁹⁹ *The Protection of Environmentally-Displaced Persons in International Law*, *supra* note 93, pg. 380.

¹⁰⁰ *Ibid.*

¹⁰¹ *Turning the Tide: Recognizing Climate Change refugees in International Law*, *supra* note 82, pg. 508.

¹⁰² *Ibid.*

specified in the refugee definition reasons for persecution are limited to “race, religion, nationality, membership of a particular social group or political opinion.”¹⁰³

Well-known refugee situations such as massive movements in the Middle East (for instance, the results of the Iraq Wars and the flight of Palestinian refugees), or movements in Asia, such as the migration of Afghan refugees to Pakistan as a result of the Soviet invasion in 1979, represents the exact scenarios for which the Refugee Convention was designed. In these cases, the types of persecution identified is based upon one of the grounds laid down in Article 1A(2) of the Refugee Convention. This greatly differs from the case with environmental refugees, when government-induced environmental degradation (for example forced relocation of people for the purposes of infrastructural or development projects, displacement as a result of natural hazards, or environmental accidents) may create or contribute to the refugee problem.¹⁰⁴ Thus, even if persecution suffered by the resulting environmental refugees can be found and recognized in the actions of government, these cases still do not fall within the scope of the Refugee Convention because they do not correspond to the grounds for the persecution as set out in the Refugee Convention. It should be noted that the definition does not leave much room for interpreting the reasons for persecution, but instead it includes an exhaustive list of race, religion, nationality, membership of a particular social group or political opinion, clearly setting the boundaries of the legal application of the Refugee Convention.¹⁰⁵

In this context, it should be mentioned that regional instruments may contain a broader refugee definition. This is the case with the Convention Governing the Specific Aspects of Refugee Problems in Africa,¹⁰⁶ which states that “the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order”¹⁰⁷ There is an ongoing debate whether the African Convention covers environmental refugees. Some scholars state that “the phrase “events seriously disturbing public order” is designed to cover a variety of man-made conditions which do not allow people to reside safely in their countries of origin”¹⁰⁸ and thus provide a legal ground. Some are adhering to an even more traditional position and argue the OAU Convention covers persons fleeing across national borders by reason of “any man-made disaster”.¹⁰⁹ Another study of this issue investigates whether events seriously disturbing the public order include environmental

¹⁰³ Convention relating to the Status of Refugees, *supra* note 50, Art. 1A(2).

¹⁰⁴ Turning the Tide: Recognizing Climate Change Refugees in International Law, *supra* note 82, pg. 508.

¹⁰⁵ *Ibid.*

¹⁰⁶ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 September 1969, entered into force 20 June 1974, 1001 UNTS 45.

¹⁰⁷ *Ibid.*, Art. 1(2).

¹⁰⁸ M.R. Rwelamira, Editorial: Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa, 1989, pg. 558.

¹⁰⁹ J.C. Hathaway, The Development of the Refugee Definition in International Law, in J. C. Hathaway, *The Law of Refugee Status*, Butterworths, Canada, 1991, pg. 17.

catastrophes such as famine and drought.¹¹⁰ As far as this thesis focuses on the international law instruments, the regional instruments of Africa will not be analyzed too specifically. Still, it should be mentioned that, even if such an interpretation is theoretically possible, some scholars note that it is not supported by the *opinio juris* of African States.¹¹¹ Thus, it can be concluded, that “refugee law and climate-induced displacement is not an easy fit, whether in the international or regional context”.¹¹²

Another example where climate migrants can be entitled to refugee protection is the case of subsidiary protection. Currently two states, Finland and Sweden, have adopted legislation granting such subsidiary protection for anyone who left their country and who, “by reason of an environmental catastrophe, cannot return to his home country.”¹¹³ Nonetheless, the Scandinavian subsidiary protection of environmental refugees is the exception to the rule;¹¹⁴ and it does not extend to the international level. Thus, the impossibility for environmental refugees to meet the ground requirements of the Refugee Convention leaves them unprotected from climate change impacts.

2.5.3. Right to return

One more obstacle that should be observed is that the concept of a refugee “tends to imply a right of return once the persecution that triggered the original flight has ceased”¹¹⁵. This seems impossible in the case of sea-level rise as it results in the loss of the place to go back.¹¹⁶ It should be recalled again that the term refugee in the sense that it has been laid down in the Convention, does not fit the nature of environmentally displaced peoples.

2.5.4. Other obstacles

Aside from the definitional obstacles there are some complications of the ruling level. Namely, the UNHCR does not encourage a wild interpretation of the existing definition. UNHCR is concerned that expanding the current definition of refugee “would possibly lead to an erosion of the currently valid international refugee protection regime. According to them, a modification of the refugee definition may have as a consequence a renegotiation of the 1951 Geneva Refugee

¹¹⁰ Alice Edwards, ‘Refugee Status Determination in Africa’, *African Journal of International & Comparative Law*, Vol. 14, 2006, pg. 210.

¹¹¹ *Ibid*, pg. 227.

¹¹² An Insecure Climate for Human Security? Climate-Induced Displacement and International Law, *supra* note 89, pg. 9.

¹¹³ Swedish 2005 Aliens Act, SFS2005:716, Chapter 4, sect.2§3; Finish Aliens Act, 301/2004, Sect.88a(1).

¹¹⁴ The International Legal Challenges of Climate Induced Migration, *supra* note 71, pg. 30.

¹¹⁵ Convention relating to the Status of Refugees, *supra* note 50, Art. 1A(2).

¹¹⁶ Migration and Climate Change, International Organization for Migration, *supra* note 4, pg. 14.

Convention, which, in the current political environment, may lead to a lowering of protection standards for refugees under the present definition”.¹¹⁷

Furthermore, the UNHCR believes that the case with environmental refugees involves moral and legal responsibility: “whereas political and war refugees are victims of their home state or of a regionalized conflict, with no direct responsibility for their plight with the countries that eventually offer refuge, the moral responsibility for climate change is different”.¹¹⁸

It has been emphasized more than once that the vast majority of people moving as a result of the effects of climate change are likely to come from countries that are least responsible for climate change, financially weak, have the least capacity to manage its aftereffects, and are not able to implement adaptation programs. Therefore many developed countries in Europe and North America fear that if the term refugee expands to cover environmental refugees, it would compel them to offer them the same protection as political refugees. Understandably, no country is willing to do so, on the account of overwhelming costs, lack of territories, and concerns about social order. At the same time, on the international level there are no existing institutions with a direct mandate to address the problem. Currently, the UNHCR is charged with providing for refugees, and, is already overstretched and unable to cope with their current “stock” of refugees.¹¹⁹

2.6. Conclusion

It can be concluded, that, even though some attempts have been made to describe environmental refugees there is no official definition and no specific regime or instrument that can be applied for their protection. The term refugee as under the Refugee Convention does not extend to cover climate or environmental refugees. This is due to the fact that the Refugee Convention’s definition is not open for the interpretation of the grounds for persecution. Thus, it excludes environmentally displaced peoples from its scope. Furthermore, there is no willingness on the side of the UNHCR and the States to extend the protection given to regular refugees to environmental refugees, and there is no special institution with a mandate to assist groups of environmentally displaced peoples. Nevertheless, the difference between the two groups of refugees, and the way in which they are recognized, brings to the forefront the necessity to look for possible effective ways to tackle the problem. The next chapter aims to investigate the example of Bangladesh, where the question of relocation was extremely acute, and suggest some solutions and instruments for the effective protection of environmentally displaced peoples.

¹¹⁷ Environmentally induced migration and displacement: a 21st century challenge, Report Committee on Migration, Refugees and Population, Parliamentary Assembly, 2008, pg. 14.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

3. Tackling the issue of climate induced displacement

3.1. Introduction

The link between climate change and migration was analyzed in the first chapter. It has been noted that there are lots of debates about whether the concepts are interrelated. Nevertheless, while some scholars are casting doubts about the relation of environmental factors to forced migration, certain countries are already experiencing these factors or are at a significant risk of doing so. For example, in 2005, it was officially decided to evacuate one thousands residents of the Cartaret Islands administrated by Papua New Guinea due to storm related erosion and salt water intrusion. In December 2006, the vast number of reports stated that the first submergence of the inhabited island was due to climate change. Namely, the Lohachara Island in the Hooghly river delta, which has been experiencing floods for years, had finally been entirely vanished, leaving 10, 000 people homeless.¹²⁰ The future estimations are quite frightening. According to Myers, the number of climate migrants will reach 200 million by 2050.¹²¹ Another prognosis made by UN Secretary-General predicts the number between 50 million and 350 million.¹²²

This chapter will focus on the investigation of the current situation in Bangladesh, as one of the countries most affected by climate change. It will be argued that, even though Bangladesh has not ratified the Refugee Convention yet, it is not the way to tackle the problem of climate induced migrants. This chapter will provide an analysis of the most popular proposed solutions in the academic area concerning the future regulation of climate induced displacement. It will be shown that each of those proposals, besides having a rationale upon them, have some weak parts, which should be analyzed in order to find a suitable solution. Ultimately, by taking into consideration all pros and cons and the specificity of the situation between India and Bangladesh, the conclusion about the most effective possible mechanisms for the protection of climate refugees for these countries will be presented.

3.2. The case of climate induced migration from Bangladesh to India

Bangladesh is the eighth most populous country in the world. According to the last United Nations World Population Prospects (2008 revision) there are around 164 million people living in this small area, with the population density more than 1, 142 persons per sq. km.¹²³ In

¹²⁰ Migration and Climate Change, International Organization for Migration, supra note 4, pg. 26.

¹²¹ Environmental Refugees: An Emergent Security Issue, supra note 83, pg. 2.

¹²² United Nations, Report of the Secretary-General on Climate change and its possible security implications, supra note 2, pg.14.

¹²³ The 2008 Revision of the World Population Prospects, Population Division of the United Nations Department of Economic and Social Affairs of the United Nations Secretariat.

contrast, the Russian Federation with a smaller population (around 140 million),¹²⁴ has a territory 118 times larger than Bangladesh¹²⁵. In addition to such high population density, Bangladesh is among the most environmentally vulnerable regions due to its geographical and spatial location. Its land consists of about eighty percent floodplain, and twenty percent of the land is one meter or less above the sea-level. In general, the country is constantly ravaged by tropical cyclones, floods, storm surges, droughts and coastal erosion. The coastal zone of Bangladesh, which covers about thirty percent of the country, is home to about 35 million people who are particularly vulnerable to climatic changes. The main reason for this is that most of the dreadful impacts are coming from the Bay of Bengal and the adjoining North Indian Ocean.¹²⁶ The future prognoses are not promising. According to the 2007 UN Fourth Assessment Report of the Intergovernmental Panel on Climate Change, the one meter rise of sea-level will cost Bangladesh up to seventeen percent of its land, and will displace at least 35 million people by 2050.¹²⁷

The current environmental crisis - in combination with the rate of population growth, high level of density, poverty incidence, dependence on agriculture, and especially limited opportunities for replacement within the country - makes the population of Bangladesh extremely disposed towards cross-border relocation.¹²⁸ This migration from Bangladesh is indeed not a new concept. Those who are not able to find new homes within the country tend to move to neighboring countries.

India is acknowledged to be the first target for migrants from Bangladesh. This fact can be explained by several factors. First of all, there is a strong interdependence between the physical and natural resources of the countries.¹²⁹ Of the fifty-seven cross-boundary rivers in Bangladesh, fifty-four are shared with India. For example, the river Ganga is one of the most important surface water supplies for Bangladesh. However, the minimum flow of the Ganges depends on the execution of the water sharing agreement between India and Bangladesh since the construction of the barrage. Thus, during the dry seasons there is a significant shortage of fresh water, which causes an intrusion of surface water salinity from the Bay of Bengal. Most of the time Bangladesh is suffering the Ganga's floods.¹³⁰ The dependence on water and the ongoing salinification forces Bangladeshis to relocate towards places where recourses are still available. Secondly, the close ethnic, linguistic, religious, and cultural links between Bangladesh

¹²⁴ The 2008 Revision of the World Population Prospects, Population Division of the United Nations Department of Economic and Social Affairs of the United Nations Secretariat.

¹²⁵ Central Intelligence Agency, The World Fact book, South Asia, Bangladesh.

¹²⁶ Architesh Panda, Climate Induced Migration from Bangladesh to India: Issues and Challenges, pg. 7.

¹²⁷ IPCC, Fourth Assessment Report: Climate Change 2007, supra note 3, pg. 484.

¹²⁸ Climate Induced Migration from Bangladesh to India: Issues and Challenges, supra note 125, pg. 8.

¹²⁹ Ibid, pg. 9.

¹³⁰ Nasima Tanveer Chowdhury, Water Management In Bangladesh: an analytical review, Water Policy 12, 2010, pg. 35.

and West Bengal in India are also playing the determining role for choosing India as a migration destination. The same is true, when it comes to family networks and economic opportunities.¹³¹ These factors help explain the choice of destination for migrants from Bangladesh. According to Delhi's estimations, there are around 20 million illegal immigrants from Bangladesh living in India.¹³² The future impacts of climate change are only going to increase this flight of population to India.¹³³

As has already been stated, developing countries are more vulnerable to climate change effects.¹³⁴ Thus, the fact that both countries, India and Bangladesh, are among vulnerable countries should receive specific attention. India is already flooded with illegal migrants from Bangladesh. This issue causes a lot of problems for India, such as an increasing rate of unemployment, because migrants are taking over job opportunities, conflicts between the locals and migrants, slum growth, and disease spreads. It is difficult to estimate the number of people who migrate due to environmental changes, because, historically, the issue of migration from Bangladesh to India has been addressed as a political issue.¹³⁵ Climate change as a new push factor for migration creates new challenges for both countries, and brings to the forefront the question of protection of climate induced migrants and citizens of the hosting county.

It is crucial to notice that in the case of South Asia, none of the countries (except Afghanistan) have ratified the Refugee Convention or its 1967 Protocol.¹³⁶ So, even without taking into consideration the recognition of climate change refugees, both countries are lacking a tool for handling refugee inflows.¹³⁷ Currently, matters of foreigners in India are regulated by the Foreigners Act of 1946.¹³⁸ The provisions of this Act deal with the entrance of foreigners to India, their presence therein, and their departure there from.¹³⁹ Paragraph 3(1) of the Foreigners Order of 1948 allows governments to grant or refuse permission to a foreigner to enter India.¹⁴⁰ Still, due to the fact that India has not ratified the Refugee Convention, it does not have any obligations to abide to international standards for refugee protection. As it has been reported by the South Asian Human Rights Documentation center the conditions of refugees in India are

¹³¹ Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh, supra note 47, pg. 9.

¹³² BBC News, Dhaka, available at:

http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/4653810.stm

¹³³ Climate Induced Migration from Bangladesh to India: Issues and Challenges, supra note 125, pg. 10.

¹³⁴ The Economics of Climate Change: The Stern Review, supra note 21.

¹³⁵ Climate Induced Migration from Bangladesh to India: Issues and Challenges, supra note 125, pg. 10.

¹³⁶ States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, supra note 52.

¹³⁷ Climate Induced Migration from Bangladesh to India: Issues and Challenges, supra note 125, pg. 16.

¹³⁸ The Foreigners Act, 1946, Act No. 31 of 1946.

¹³⁹ Ibid.

¹⁴⁰ Foreigners Order, 1948, National Legislative Body, India.

deplorable, and in fact, their rights are not recognized and respected.¹⁴¹ It can be concluded that refugee protection is a great issue for South Asian countries in general.

Due to fact this thesis focuses on people induced to displacement by climate change, the further analysis will be concentrated on protection only of this category of migrants. The existing legal gap and the lack of policies on refugees are especially unfortunate in the light of ongoing climate change. Currently, India has no tools to deal with the additional flight of climate change migrants.

Furthermore, none of these countries have shown any attempt to deal with them. Scholars are explaining this inactivity with several reasons. The first one is the already mentioned lack of scientific evidence about the link between climate change and migration. Conclusions from the first chapter show that this interrelation is considered to be controversial and the scope of climate migration is difficult to estimate. However, the fact that climate change is going to induce cross-border displacement has currently been accepted. Thus, it seems that procrastination due to these reasons are no longer valid. Secondly, India historically considered the flow of refugees from Bangladesh as a political issue, and as a threat to its national security. From this perspective, it is understandable why there is no willingness on the side of India to open its borders for a massive flow of refugees and to take responsibilities for their protection.¹⁴² Furthermore, due to some historical and political reasons, the official line of the Bangladeshi government is that there is no illegal migration between Bangladesh and India.¹⁴³ The denial of the problem by Bangladesh significantly worsens the problem. The example of these Asian countries shows the necessity to recognize the new category of migrants, and requires some urgent measures.

The second chapter has provided evidences that the category environmental refugee or climate change refugee is not recognized by existing international legal framework. Even being called refugee by many scholars, politicians, and governors – people induced to displacement by climate change are not falling under the scope of the Refugee Convention. Thus, the simple ratification of the Refugee Convention by Bangladesh and India will not be sufficient enough to tackle the issue of climate migrants. There is an obvious need to modify the international legal framework, establish the mechanisms to regulate climate change induced migrations and find the ways for its effective implementation. The following section will investigate existing proposals on how to solve the problem, which are currently under discussion of scholars and policy makers.

¹⁴¹ Refugee protection in India Oct 1997: South Asia Human Rights Documentation Centre.

¹⁴² Climate Induced Migration from Bangladesh to India: Issues and Challenges, supra note 125, pg. 19.

¹⁴³ Swimming against the tide: Why the climate change displacement treaty is not the answer, supra note 14, pg. 20

3.3. Ways to protect climate migrants

As it has been observed, the current legal framework, namely refugee law and climate change law, has no mechanism for the protection of people displaced by climate change. Nevertheless, there are a number of proposals on how the issue can be solved. The literature review identifies several ways to address existing gaps in the international legal framework. Due to the limits of this thesis, only several of them will be analyzed, those which seem the most rational and realistic. Among them are suggestions to: expand the definition of refugee within the Refugee Convention, create a separate protocol to the UNFCCC, and create a new legal instrument to deal with climate refugees.

3.3.1. Expanding the Refugee Convention

The first proposal, which has support among scholars, is the suggestion to deal with climate change refugees by expanding the scope of the Refugee Convention. Specifically, those who are in favor of this approach, claim that it is possible to expand the 1951 definition of refugee along the human rights lines. The definition of refugee, as it set up in the Refugee Convention contains five freedoms such as: freedom from persecution for reasons of race, religion, nationality, membership of a social group, and political opinion.¹⁴⁴ All these rights are recognized by the Universal Declaration of Human Rights.¹⁴⁵ Granting of the refugee status means that these human rights are denied. According to Cooper: “expanding the established refugee definition to encompass environmental refugees may require no more than an easy extension of human rights policy. Since the 1951 refugee definition is heavily imbued with human rights notions, and environmental refugees are no less entitled to their basic rights and needs than their traditional counterparts, using human rights concepts to expand the refugee definition has natural appeal”.¹⁴⁶

The Refugee Convention also recognizes the right to seek safety, as laid down in Article 14(1) of the Universal Declaration of Human Rights.¹⁴⁷ Two other human rights instruments, such as the International Covenant for Civil and Political Rights and the International Covenant for Economic and Social Rights, acknowledge the “inherent right of all peoples to enjoy and

¹⁴⁴ David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees*, 2004, *Georgetown Environmental Law Review*, pg.4.

¹⁴⁵ Universal Declaration of Human Rights, 1948, G.A. Res. 217A, UN Doc. A/810 71.

¹⁴⁶ Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 *N.Y.U. ENVTL. L.J.* 480, 1998.

¹⁴⁷ Universal Declaration of Human Rights, *supra* note 144, Art. 14(1).

utilize fully and freely their natural wealth and resources”¹⁴⁸ and “in no case may a people be deprived of its own means of subsistence”¹⁴⁹. Therefore, authors who are in favor of this approach are claiming that the solution to the problem of environmentally displaced persons would be an extension of the definition contained in the 1951 Refugee Convention in line with those developments under international human rights law¹⁵⁰.

3.3.2. Solutions within the UNFCCC

The second solution is creating a separate protocol to the UNFCCC. As one of the obvious advantages of this approach, scholars are mentioning the strong political support from countries which are parties to the UNFCCC. Biermann and Boas suggest that a new climate refugee regime must build on a set of principles, which would need to be embedded into the Protocol on Recognition, Protection and Resettlement of Climate Refugees to the UNFCCC.¹⁵¹ These principles are going to cover the whole scope of the problem, taking into consideration its legal, political and ethnical dimensions. The first one is the principle of planned relocation and resettlement. This approach is favorable over emergency response or disaster relief. It requires the search for better strategies to predict climate change impacts and to be able to respond more timely. The governance of climate refugees has to take gradual actions to assist with voluntary relocation and support resettlement programs. These actions should be spread over long periods of time to prevent spontaneous and massive flights.¹⁵²

The second is the principle of resettlement. As it has been observed, a large number of climate refugees will not be able to return to their home countries. Thus, instead of temporary asylum they should be granted permanent rights in the countries which accept them.¹⁵³

The third one is the principle of collective rights for local population. Migration due to the climate change is a collective phenomenon, because climate refugees are likely to relocate in large numbers (for example entire villages or provinces). While the wording of the Refugee Convention is based on individual prosecution, climate change makes it crucial to recognize collectives of people, such as the population of a city or region¹⁵⁴.

The next principle is the principle of international assistance for domestic measures, which stands to strengthen international help, and funding of governments and local

¹⁴⁸ International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 47, 999 U.N.T.S. 171, 185; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 10.

¹⁴⁹ Ibid

¹⁵⁰ The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees, supra note 143, pg. 4.

¹⁵¹ Frank Biermann and Ingrid Boas, Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, Global Governance Project, Global Governance Working Paper No. 33, 2007, pg. 25.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

communities, to protect people within their own territory. This principle is especially important when it comes to developing countries, because there is an existing legal responsibility of the states to protect their citizens; developing countries affected by climate change usually lack the sources to do that.¹⁵⁵

The last important principle is the principle of international burden-sharing. The new regime should be based on the principle of common but differentiated responsibilities and respective capabilities. This principle suggests that industrialized countries have contributed the most to current climate change: they have to bear most of the costs for the protection of climate refugees. Other features of the principle of international burden-sharing are “the principle of reimbursement of full incremental costs of affected countries occurred through resettlement of climate refugees; and the principle of double-weighted decision-making procedures, which would give developing countries a structurally larger clout in a new institution on climate refugees”.¹⁵⁶

These principles lay down the foundation for a new Protocol. Biermann and Boas have suggested naming it the Protocol on Recognition, Protection and Resettlement of Climate Refugees, and have claimed that it would have strong political support from all parties to the UNFCCC.

The work under the new instrument will be carried out through an executive committee, which will be functioning under the authority of the conference of the parties to the UNFCCC. The committee will designate the areas that are in need to relocation by climate change or are threatened by it. These areas will be placed under the jurisdiction of the respective State. However, with respect to the sovereignty principle of the United Nations, inclusion of the affected areas, as well as further supportive actions, will be determined only in case that the affected State itself proposed and agreed upon such an inclusion. It is suggested that the composition of the committee should be composed of an equal number of affected and donor countries, in order to carry out fair and productive negotiations. Furthermore, the decisions of the committee should rely on advice, thus a specialized group of scientists should be a part of all negotiations. Eventually, the inclusion of a certain territory to the list of these risk areas will trigger specific supportive programmes, such as financial support, resettlement programmes and international assistance with relocation.¹⁵⁷

With regard to managing of massive resettlement, there is a need for the regional and global assistance of international agencies. It is suggested to designate a network of

¹⁵⁵ Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, supra note 150, pg. 26.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, pg. 27.

implementing agencies, which will work under the authority of parties to the UNFCCC Protocol on Recognition, Protection and Resettlement of Climate Refugees. Finally, the issue of financing will be resolved through a separate fund, based on the grant basis. The underlying principle for funding will be the principle of reimbursement of full incremental costs, in cases when the causal link between climate change and migration is unchallengeable (for example sea-level rise). In cases where climate change is only one of the factors causing environmental degradation (such as water scarcity), funding will be based on principle of additional funding¹⁵⁸.

Another suggested solution also lying within the UNFCCC includes the creation of regional agreement, operating under this international umbrella. Among the advantages of this model are: firstly, a higher level of mobility, as regional cooperation, based on the existing geopolitical and economic relationships, allows states to respond timely to sudden events; and secondly, regional agreements are expected to achieve a greater level of commitment from participating states.¹⁵⁹ Currently, the UNFCCC promotes regional policy development. According to Article 4(1)(b): “all Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall . . . formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases... and measures to facilitate adequate adaptation to climate change”.¹⁶⁰ This commitment can be extend through regional agreements. The Kyoto Protocol also has provisions which reaffirm states’ commitments to adaptation.¹⁶¹ Article 19(b) obliged parties to “formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change”.¹⁶² Furthermore, during the UNFCCC Conference of the Parties in 2005, states agreed to a five-year program of work on impacts, vulnerability, and adaptation to climate change (Nairobi Work Programme).¹⁶³ One of the main objectives of the programme was the mutual assistance between the parties, especially when it comes to the needs of developing and least developed countries. Thus, it can be concluded that an international framework within which regional cooperation can be developed, already exists. According to Williams, post-Kyoto agreements should recognize

¹⁵⁸ Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, supra note 150, pg. 27.

¹⁵⁹ Turning the Tide: Recognizing Climate Change Refugees in International Law, supra note 82, pg. 518.

¹⁶⁰ United Nations Framework Convention on Climate Change, opened for signature May 9, 1992, FCCC/INFORMAL/84, GE.05-62220 (E) 200705, Art. 2(1).

¹⁶¹ Turning the Tide: Recognizing Climate Change Refugees in International Law, supra note 82, pg. 519.

¹⁶² Kyoto Protocol to the Framework Convention on Climate Change, opened for signature 16 March 1998, 37 ILM 22.

¹⁶³ UNFCCC, The Nairobi Work Programme, available at:

http://www2.dsi.gov.tr/iklim/dokumanlar/nairobi_work_programme_the_second_phase2008.pdf

the fact that regional initiatives are favored over international agreement as they help to respond more clearly and directly to the problem of climate induced displacement.¹⁶⁴

As to the more specific characteristics of post-Kyoto agreements, the suggestion is that it should include the following features. First of all, it should recognize the link between climate change and migration, and thus admit the existence of resulting problems. Secondly, it should encourage regional cooperation in respect to the problem of climate displacement. If, currently, the UNFCCC and the Kyoto Protocol contain the requirements for states only with regard to adaptation, the new protocol should lay down requirements concerning climate change displacement. Finally, besides the binding agreement, a role should be given to the non-binding instruments. Such as, suggested by Williams, a Memorandum of Understanding or Plan of Action, which are going to promote discussion among the states over the strategies and techniques for implementing regional initiatives.¹⁶⁵

3.3.3. Creation of a new instrument

The third solution goes beyond the extension of existing instruments, and suggests the creation of an entirely independent convention. Those who are in favor of this approach claim that the new instrument will emphasize the urgency of climate change refugee's problems and be able to address the key questions, that are not covered by the Refugee Law and the UNFCCC. Secondly, an independent climate change refugee treaty will allow combining such areas as human rights law, humanitarian law and international environmental law into one universal convention. It will also make it possible to include both vertical and horizontal obligations, because a climate change regime concerns not only individual rights, but also state-to-state obligations.¹⁶⁶ Moreover, scholars claim that a new treaty "can be in fact more feasible and produce more powerful results".¹⁶⁷ This can be achieved through the involvement of both state and non-state actors in the negotiation of the treaty. Developing countries, particularly vulnerable nations already affected by climate change, as Bangladesh, India or Tuvalu, can work with the civil societies to promote the necessity of a new treaty. Active participation will also ensure that the concerns of the affected communities as well as the states are reflected in the new treaty's provisions.¹⁶⁸

An independent instrument will serve the interests not only of the displaced people and their home state, but also the interests of the host state and the international community. Those

¹⁶⁴ Turning the Tide: Recognizing Climate Change Refugees in International Law, supra note 82, pg. 520.

¹⁶⁵ Ibid.

¹⁶⁶ Bonnie Docherty, Tyler Giannini, Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, pg. 397.

¹⁶⁷ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg. 398.

¹⁶⁸ Ibid.

who were affected will receive assistance; the host state will benefit from the support for the implementation of human rights protections and humanitarian aid. Some can argue that it is not advantageous for the host state to join a new legal regime, and thus be obligated to provide assistance to climate refugees.¹⁶⁹ However, as history shows, any attempts by countries to seal themselves off from refugees, tend to fail: refugees will always find ways to cross borders. This has been proven by the example of the United States, which could not restrain the migration of Mexicans and other Hispanics across its southern frontier. In Europe, the same is true when it comes to attempts to keep out an increasing influx of Africans.¹⁷⁰

For the rest of international community, the development of an independent convention will also be beneficial, as it will give some guarantees for humanitarian assistance. Thus, while it is the case that with emissions reductions there has been little success in reaching an agreement with the developing countries, this will not affect climate change refugees, because the emission debates could continue.¹⁷¹

Furthermore, the new regime can be surprisingly cost-effective. For example, for some countries it might be preferable to assist home states with preventing flights or host states with integration instead of taking in refugees themselves.¹⁷² Finally, the discussed above security concerns could also motivate states to join the convention. The convention can even play a preemptive role and by helping to manage and control the refugees flights.

Another suggestion of an independent legal instrument was introduced after the United Nations Climate Change Conference in 2009, which included the 15th Conference of the Parties (COP 15) to the United Nations Framework Convention on Climate Change and the 5th Meeting of the Parties (MOP 5) to the Kyoto Protocol.¹⁷³ The result of the Copenhagen Climate Change Conference was the Copenhagen Accord, in which the states agreed that “deep cuts in global emissions are required according to science and agreed that they should cooperate in achieving the peaking of global and national emissions as soon as possible”¹⁷⁴. However, as supporters of the following proposal claim, neither the UNFCCC nor the Copenhagen Accord observe or address the issue of displacement. Therefore, they are suggesting a new comprehensive and global instrument that would build on the earlier studies and attempts to find a solution. The new convention, with the main focus on the human displacement due to the climate change, should

¹⁶⁹ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, *supra* note 165, pg. 401.

¹⁷⁰ Norman Myers, Jennifer Kent, *Environmental Exodus, An Emerging Crisis in the Global Arena*.

¹⁷¹ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, *supra* note 165, pg. 401.

¹⁷² *Ibid.*

¹⁷³ The United Nations Climate Change Conference in Copenhagen, 7-19 December 2009.

¹⁷⁴ Copenhagen Accord, Conference of the parties, 15th session, Copenhagen, 2009, pg. 2.

include both those who moved internally and those who have to cross borders, as well cover both permanent and temporary displacement.¹⁷⁵

A number of issues should be taken into account with respect to the suggested mechanism for the protection and assistance to people displaced by climate change. The first one is the issue of causation. Namely, the new instrument should be based on sufficient scientific evidence as to whether the displacement was caused by climate change. Up to date scientists cannot determine this correlation.¹⁷⁶ However, the IPCC has described certain impacts as consistent with climate change. These include the rise of the water's temperature, an increasing number of droughts and storms, and the continuing rise of sea-level.¹⁷⁷ Thus, the issue of consistency between happening events and climate change should be reflected in the new instrument. Furthermore, the new mechanism should take into account developments in scientific understanding over time, and be flexible enough to address them.¹⁷⁸

It has been observed, that the issue of determining the likelihood that people have contributed to a certain type of disruption is highly debatable. Currently, the IPCC likelihood range implies a more likely than not (greater than fifty percent) standard.¹⁷⁹ The supporters of the new legal instrument under discussion agree with the importance of taking into account the extent to which humans have contributed to particular climate change events, but they are suggesting that the new instrument should be based on a very likely standard (greater than ninety percent probability) to identify certain phenomena and trends as consistent with climate change and human contribution. The authors of the current proposal expect that the adoption of the "very likely" standard will play an important role. They expect that, because of the higher level of certainty, states will be more enthusiastic about the application of the new convention, especially with the regard to slow-onset, gradual displacement.¹⁸⁰

The issue of financing, accordingly to the new instrument should be based on the principle of common but differentiated responsibilities. Consequently, the developed states party to the Convention will have to make mandatory financial contributions to a special fund, which will be responsible for providing and distribution financial assistance.¹⁸¹

Finally the new instrument should address the difference between internal and cross-border displacement, but at the same time not disregard one of these groups. It has already been stated that the new convention attempts to cover both. It is suggested that, in case of internal

¹⁷⁵ David Hodgkinson, Tess Burton, Lucy Young and Heather Anderson, Copenhagen, Climate Change 'Refugees' and the Need for a Global Agreement. Public Policy, Vol. 4, No. 2, 2009, pg. 7.

¹⁷⁶ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg. 401.

¹⁷⁷ IPCC, Fourth Assessment report: Climate Change 2007, supra note 17.

¹⁷⁸ Copenhagen, Climate Change 'Refugees' and the Need for a Global Agreement, supra note 174, pg. 8.

¹⁷⁹ IPCC, Fourth Assessment report: Climate Change 2007, supra note 17.

¹⁸⁰ Copenhagen, Climate Change 'Refugees' and the Need for a Global Agreement, supra note 174, pg. 8.

¹⁸¹ Ibid, pg. 11.

displacement due to climate change, the obligations towards the protection of affected people should be shared between the home State and the international community. Therefore, the new instrument will emphasize that the primary responsibility to protect and provide assistance to people induced for internal relocation is indeed on the side of the national authorities. However, taking into account the developing countries, and those who are not able to provide sufficient protection, the home State should have an opportunity to request some assistance from other parties to the Convention, which would be obligated to provide this assistance.¹⁸²

As to the rights and obligations in case of international displacement, the new convention would use the template of the Refugee Convention. The authors of the current proposal agree that the Refugee Convention is a useful model for the effective protection of the human rights, because it “consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees yet attempted on the international level”.¹⁸³ However, the new convention should go further than just guaranteeing a minimum set of rights for climate refugees. In some cases these rights should be based on absolute standards, or at least standards which apply for the nationals of the host country. Only in this way would refugees get a sufficient level of protection, especially in case of the developing countries. Furthermore, these rights should expand on a gradually increasing basis, with regard for the duration of displacement, changing environmental conditions and scientific knowledge. Lastly, the granted rights should be guaranteed until climate refugees acquire a new nationality, voluntarily returned to their home country, or refused to return when it is not safe for them to do so.¹⁸⁴

All those proposals, no doubt have a rationale behind them and all of them, are already a big success as they drew attention and emphasize the urgency of the problem of climate induced displacement. Nevertheless, they are the target of ongoing debates, and are constantly exposed to critics. The following section will analyze different concerns in regard to these suggested solutions. It will also help to build an ultimate conclusion, and identify the way to make the protection of people induced to displacement more effective.

¹⁸² Copenhagen, Climate Change 'Refugees' and the Need for a Global Agreement, *supra* note 174, pg. 12.

¹⁸³ Introductory Note to UNHCR, Convention and Protocol Relating to the Status of Refugees, 2007.

¹⁸⁴ Copenhagen, Climate Change 'Refugees' and the Need for a Global Agreement, *supra* note 174, pg. 8.

3.4. Pros and cons

3.4.1. Expanding the Refugee Convention

The first proposal, which was scrutinized above, is the suggestion to extend the mandate of 1951 Refugee Convention.¹⁸⁵ It might sound like a very logical solution, since as it has been emphasized, the Refugee Convention “consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees yet attempted on the international level”.¹⁸⁶ However, even though the 1951 Refugee Convention and the 1967 Protocol provide a well respected and well-established human rights framework for refugees, it was not designed with the purpose to protect climate refugees.¹⁸⁷ The first reason to reject the idea of amending the Refugee Convention is that it could undermine the protection of political refugees. It is unlikely that the UN agencies and the potentially hosting States will be enthusiastic about the extension of the refugee definition. Currently, the refugee regime is under pressure from the people of the developing countries who are searching for the ways to receive refugee status, and, at the same time, developed countries who are trying to hold back this process. According to the latest data, the number of refugees at the beginning of 2011 was estimated to be 10.4 million people.¹⁸⁸ Taking into account the scale of climate change, this number will be enlarged by twenty times if people induced to displacement by climate change receive a legal “refugee” status.¹⁸⁹ This extension will weaken the protection of political refugees, due to the higher demand on financial recourses and the lack of capacity to assist the increased amount of refugees.

The second problem is that the protection of climate refugees is, in essence, a development issue.¹⁹⁰ If the future prognoses come true the capacity of the UNHCR will not be enough. The current overload of the UNHCR and the limits of its authority will not allow protecting climate migrants by the Refugee Law’s instruments. The scale of the problem will require extensive, long-term resettlement programs. In some cases, this protection will be required while people are still within their country and are not therefore covered by the Refugee Law. Of course, they could receive some protection under the UNHCR’s Guiding Principles on Internal Displacement, but it does not appear to be an appropriate solution to the problem, as the

¹⁸⁵ The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees, supra note 143, pg.4.

¹⁸⁶ Introductory Note to UNHCR, Convention and Protocol Relating to the Status of Refugees, 2007.

¹⁸⁷ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg. 398.

¹⁸⁸ UNHCR, The UN Refugee Agency, Refugee Figures.

¹⁸⁹ Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, supra note 150, pg. 14.

¹⁹⁰ Ibid, pg. 20.

specific needs of climate displaced persons still will not be taken into account. Thus, even if the definition under the Refugee Convention was extended, some legal gaps would still remain, and new institutions able to assist climate change refugees will still be essential.¹⁹¹

Another obstacle is that the Refugee Convention does not assign responsibility for assistance according to the principle of common but differentiated responsibility.¹⁹² The way it is laid down in the Convention, is that the first host country has to accept refugees.¹⁹³ While the host state has vast responsibilities to the migrants, the assistance of the UNCHR stays limited, and bases on the voluntary contributions of other states. The extension of the Refugee Convention to climate migrants seems unfair and even shuttering to many countries. As investigated in the above case of India and Bangladesh, India is likely to receive a huge amount of climate refugees. At the same time, the financial and territorial capacities of the country would not be able to respond to this demand.¹⁹⁴ The rule provided by the refugee regime seems unfair to India. The fact that climate change is a global problem to which all the states have contributed to some extent, makes the ignorance of burden-sharing inappropriate, and will only deepen the crisis.

Moreover, the extension of the refugee regime will disconnect the issue of migration and adaptation.¹⁹⁵ It is important to remember that the motives for the migration of climate change refugees are different from those of political refugees. While the last ones have a desire to leave their home state, the climate migrants usually do not have choice. Comprehensive local and global adaptation strategies can play a significant role in preventing a climate refugee crisis. They can make it possible for people affected by climate change to adapt to the changing environmental conditions, and possibly stay in their homes longer. Such adaptation strategies should be incorporated in the climate refugees' regime, but it seems unlikely that it can be done within the scope of the Refugee Convention, as it has a totally different focus.

It can be concluded that the Refugee Convention's framework is too limited when it comes to climate refugees.¹⁹⁶ The essential components of a climate change refugee instrument are not addresses by the Refugee Convention, and, thus, its extension to people displaced by climate change seems to not be the answer.

¹⁹¹ Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees , supra note 150, pg. 21.

¹⁹² Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg. 394.

¹⁹³ Convention relating to the Status of Refugees, supra note 50, Art. 31.

¹⁹⁴ The International Legal Challenges of Climate induced Migration: Proposal for an International Legal Framework, supra note 71, pg. 52.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

3.4.2. Protocol to the UNFCCC

Concerning the suggestion of a new protocol to the UNFCCC, there are also a number of objections. As some scholars claim, the mandate of the UNFCC is too limited for the purposes of protecting climate refugees. The UNFCCC's main focus is environmental protection, and preventive measures to climate change affects, not remedial measures that protect people.¹⁹⁷ According to Article 2 of the UNFCCC, its ultimate objective and the objective of "any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner".¹⁹⁸ Even though the UNFCCC stands to "protect the climate system for the benefit of present and future generations of humankind,"¹⁹⁹ it shows a universal approach, which is not exactly concentrating on human rights protections and humanitarian aid to individuals such as climate change refugees.²⁰⁰ The nature of the UNFCCC requires Parties to: "take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects"²⁰¹. These measures include the reduction or prevention of anthropogenic emissions of greenhouse gases,²⁰² promotion of sustainable management and cooperation,²⁰³ promotion of related research,²⁰⁴ and exchange of relevant information.²⁰⁵ Only Article 4(1)(e) mentions adaptation, stating that parties shall: "[c]ooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas".²⁰⁶ However, these remedial measures do not focus specifically on the cross-border displacement problem.²⁰⁷

Another shortcoming of the UNFCCC is that it does not incorporate human rights issues in its provisions. A human rights component is essential for a climate change refugee instrument, because it should be able to guarantee protection to people who have suffered from climate

¹⁹⁷ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg. 395.

¹⁹⁸ United Nations Framework Convention on Climate Change, supra note 159, Art. 2.

¹⁹⁹ United Nations Framework Convention on Climate Change, supra note 159, Art. 3(1).

²⁰⁰ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg.395.

²⁰¹ United Nations Framework Convention on Climate Change, supra note 159, Art.3(3).

²⁰² United Nations Framework Convention on Climate Change, supra note 159, Art.4(1)(c).

²⁰³ United Nations Framework Convention on Climate Change, supra note 159, Art.4(1)(d).

²⁰⁴ United Nations Framework Convention on Climate Change, supra note 159, Art.4(1)(g).

²⁰⁵ United Nations Framework Convention on Climate Change, supra note 159, Art.4(1)(h).

²⁰⁶ United Nations Framework Convention on Climate Change, supra note 159, Art.4(1)(e).

²⁰⁷ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg. 395.

change. However, the UNFCCC and other environmental treaties historically have concentrated on environmental protection, not on the specific rights of communities and individuals.

Furthermore, there are a lot of concerns with regard to the effectiveness of the UNFCCC. It can be observed that states are showing little enthusiasm to resolve the problems connected with climate change.²⁰⁸ For example, some States of the South Pacific regional alignment or OAS are remaining reluctant when it comes to the recognition of the extent of climate change, or making the necessary mitigation and adaptation commitments.²⁰⁹ The atmospheric concentration of carbon dioxide has only increased since the creation of the UNFCCC. Accordingly, a lot of scholars argue whether the existing climate change framework can effectively cover migration issues.²¹⁰

However, as the UNFCCC is seen by some scholars as an incapable instrument for addressing the issue of climate change refugees, the final section of the current chapter will argue that the creation of a protocol to the UNFCCC is indeed a very realistic and potentially effective solution.

3.4.3. Creation of a new instrument

With respect to the proposal on creation of a totally new legal instrument for protection of people displaced by climate change, there are also some concerns.

One of the difficulties lies in the nature of climate induced displacement. The issue of rights and responsibilities in respect to displaced persons is substantially connected to state sovereignty, and state's will to grant some protection. As an example, the Kyoto Protocol has demonstrated how much these environmental impacts are dependent on political and economic policies, and has shown that a lot of countries are still reluctant to make binding commitments. It will be hard to achieve a universal agreement in the field of climate displacement as well, because it will require some states to accept responsibility for the environmental damage, and thus carry the costs of it. The unwillingness of states to take these responsibilities is fair in regard to both: developing and developed countries. Considering the example of the United States, which has not agreed even to the most general commitments under the Kyoto Protocol, only strengthens this point.²¹¹

The second problem with a new global agreement is related to the notion of climate change refugees. As it has already been observed, the existing legal framework recognizes two categories of migrants. Those who have crossed borders are under the regulation of the Refugee

²⁰⁸ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg. 395.

²⁰⁹ Turning the Tide: Recognizing Climate Change Refugees in International Law, supra note 82, pg. 521.

²¹⁰ Confronting a rising tide: A Proposal for a Convention on Climate Change Refugees, supra note 165, pg. 395.

²¹¹ Turning the Tide: Recognizing Climate Change Refugees in International Law, supra note 82, pg. 517

Convention, and those who have relocated within their own country (IDPs) are regulated by the UNHCR's Guiding Principles on Internal Displacement. This distinction between cross-border and internal displacement could present a significant obstacle when it comes to creation of a new agreement. Even though this difficulty could be resolved some time in the future, if ongoing debates among scholars and policymakers come to the agreement, it "would likely prove to be a debilitating factor that could frustrate ongoing discussions toward a new agreement".²¹²

Lastly, the climate change rate makes the search for an appropriate regulation mechanism a matter of high urgency. The creation of a totally new legal instrument is a very time consuming process, because it requires bringing together a large number of components, such as political willingness from states, the creation of relevant institutions, solutions for funding, etc. Thus, even if a new legal instrument can be responsive to the demands of climate refugees, the length of its creation is probably something that the international community currently can not afford.

3.5. Which solution can work best in case of India and Bangladesh?

The issue of cross-border flights of climate refugees from Bangladesh to India and the resulting need to adopt protection mechanisms has been analyzed above. It has also been shown that there is a number of suggestions how the problem of the protection of climate refugees can be resolved. This section, by taking into account all pros and cons and the specificity of the situation between India and Bangladesh, aims to identify the most suitable and effective way to resolve the climate refugees issue in these countries.

The suggestion to tackle the problem by simply extending the refugee definition of the Refugee Convention does not seem to be a sufficient solution. The example of Bangladesh and India is not accidental in this thesis. Both being the developing countries, which are among those who have not ratified the Refugee Convention and in general show reluctance to admit any responsibilities in regard to refugees, they present a good check to this proposal. The denial of the principle of common but differentiated responsibilities and the inability of the overloaded UNHCR to provide assistance to climate refugees, including financial help, only reaffirms that there will be no motive for these countries to join the Refugee Convention in the future. In addition to the fact that the extension of the refugee definition will not be helpful with the respect to climate refugees, it will also worsen the protection of those who were originally protected by the Refugee Law, namely political refugees. Thus, this solution seems to bring new problems rather than tackling the existing ones.

²¹² Turning the Tide: Recognizing Climate Change Refugees in International Law, *supra* note 82, pg. 517-518.

Concerning the proposals of entirely new mechanisms, there are also some well-grounded doubts. Namely, no matter how detailed and responsive those proposals might be, they sound utopian in general. Apart from the issue of achieving a high level of states commitment, the creation of a totally new legal instrument is a very long and difficult process, that requires the creation or search for respective institutions, sufficient funding sources, work on legal framework and codification. Thus, even though the new mechanism might cover most of the climate refugee's demands, the rate of climate change does not let the international community take time for its creation. The case of India and Bangladesh only proves this point. The rate of illegal migration from Bangladesh to India is very high and increasing over the course of time.²¹³ Furthermore, the fact that Bangladesh denies the existence of the illegal migration,²¹⁴ and that India is not willing to take any responsibilities with regard to climate refugees,²¹⁵ might also be an obstacle. There is no guarantee in general that these countries will be enthusiastic about a new convention. Thus, it seems irrational to begin the costly and complicated process without any kind of conditional consent from these countries.

Ultimately, the solution which seems to be the most realistic and feasible is the creation of a separate protocol to the UNFCCC. Before going to the obvious advantages of such a protocol, the objection to this proposal should be discredited. First of all, the concerns that the UNFCCC does not focus on the protection of people, but rather on the environmental protection, seem to be not significant. What seems important, is that the UNFCCC is focusing on the climate change issue, and has a sufficient scientific foundation. The protection of climate refugees will be the aim of the new protocol. With political support from the countries which are party to the climate convention, and with the use of available and constantly updated scientific data, the protection of climate refugees can become a successful practice.

The concern about the effectiveness of the UNFCCC, and the unwillingness of states to join, is also seen as an exaggeration. The fact that the atmospheric concentration of carbon dioxide has increased since the creation of the UNFCCC, although being a dreadful fact, seems to be connected to increasing development, this does not mean that States would not be interested in joining a Protocol for the protection of climate refugees. On the contrary, it has been shown that all counties – in particular the potential host-states, and those who are going to be, or already are, the source of climate refugees - will benefit from the ratification of a new Protocol. Firstly, the principle of common but differentiated responsibilities is currently imbedded into the UNFCCC, and will provide the basis for the future Protocol. The fact that

²¹³ Climate Induced Migration from Bangladesh to India: Issues and Challenges, *supra* note 125, pg. 10.

²¹⁴ Swimming against the tide: Why the climate change displacement treaty is not the answer, *supra* note 14, pg. 11.

²¹⁵ Climate Induced Migration from Bangladesh to India: Issues and Challenges, *supra* note 125, pg. 19.

those who have contributed the most to climate change would have to bear most of the costs for protection of climate refugees plays a crucial role for the developing countries. Such countries as India and Bangladesh are not among those who are blameworthy for climate change; however, they could be undermined by its effects. Consequently, it is crucial that they receive protection from the international community. The principle of reimbursement of full incremental costs is another reason why developing countries will be interested in ratifying this Protocol. As to the developed countries, they also will have some motives to join. First of all, since they can also be threatened by massive flight of climate refugees, they will be able to get humanitarian assistance. Secondly, they will do so for security reasons, to be able to count on international support in case of conflict.

It has been stated that the disadvantage of an originally new legal instrument is that there is no guarantee that such countries as India and Bangladesh would be willing to join. The same of course can be true with the regard to a Protocol to the UNFCCC. However, this option is still seems more probable and rational, because both states have ratified the UNFCCC.²¹⁶ Hence, there is at least existing commitments under the UNFCCC, and the opportunity to discuss a new Protocol within the existing forum.

Taking into account the fact that the institutional regime under the UNFCCC is already established and is functioning, the fact that there is vast support from member states, and that the work under the Convention is based on findings of the climate science, makes the protocol to the UNFCCC a realistic and effective option. There is even an international arena, such as the Conference of the Parties, where this proposal can be introduced and discussed.

3.6. Conclusion

This chapter by analyzing the issue of climate refugees' flight from Bangladesh to India has shown the urgency of searching for new protection mechanisms. The number of already proposed solutions is indeed inspiring and giving hope that the issue can be resolved in the future. Among the most recognized and supported proposals are, the extension of the "refugee" definition within the Refugee Convention, amendment of a separate Protocol to the UNFCCC, and the creation of an entirely new convention focused on climate refugees. However, while all these proposals have a rationale behind them, their disadvantages should not be underestimated. After all the pros and cons have been weighed, and the peculiarity of the India and Bangladesh case has been taken into account, the most realistic and suitable solution for the protection of

²¹⁶ United Nations Framework Convention on Climate Change, Status of ratification.

climate refugees has been derived. It has been argued that a separate Protocol to the UNFCCC is indeed the best option for these countries.

Conclusion

Climate change and climate change-related effects have a horrific impact not only on the environment, but also on human inhabitants. The number of natural catastrophes is growing together with the number of people who are migrating due to climate change. If the existing prognoses come true, we can expect between 50 million and 350 million climate migrants by 2050. Throughout the current research the issue of the legal protection of people induced to cross-border displacement has been examined. By taking as an example the case of India and Bangladesh, which is currently presented as one of the most striking evidences of climate induced displacement, the specificity of the problem in general has been shown. The findings of this analysis allow to draw some conclusions about the nature of climate induced cross-border displacement, the status of people induced for cross-border migration by climate change, and the gaps in the existing legal framework for the protection of this category of migrants. Ultimately, it allows to answer the central research question about the extent to which the 1951 Convention relating to the Status of Refugees can be applied for the protection of people at risk of climate induced cross-border displacement. Furthermore, the current research considered a number of possible solutions concerning the future regulation of climate induced displacement, and identified the one which seems to be the most effective.

The nature of the relationship between climate change and cross-border displacement is considered to be highly controversial. Nevertheless, this thesis has shown that even though some scholars argue that it is impossible to identify what factors have forced the person to move (climate change or living conditions in general), the fact that certain areas will become completely unsuitable for living because of climate change, is widely accepted by scientists. This, of course, will leave people no other choice than to relocate. Furthermore, it has been argued that even though it is hard to identify the core cause of migration, it does not justify the denial of this category of migrants. It has been argued that instead of searching for the real motives for the relocation of individuals affected by climate change, the focus needs to be placed on the protection of these people.

However, as the analysis has shown, the nature of cross-border displacement conceals some problematic aspects. These include: political problems, namely the lack of state' will to recognize climate migrants and grant them protection; the economical consequences, such as an absence of financial resources to deal with climate refugees, especially in the case of developing

countries; and social difficulties, which include the growing number of conflicts and violence resulting from cross-border migration. All these problems are linked to the fact that the category of people induced for displacement by climate change is relatively new, and is not recognized under international law.

When it comes to the protection of refugees in general the only existing instrument on the international level is the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention), with one optional Protocol. However, it has been shown that its protection does not extend to climate refugees. The Refugee Convention defines refugees as persons faced with a “well-founded fear of being persecuted” in their country of origin, and this persecution is based on “reasons of race, religion, nationality, membership of a particular social group or political opinion”. The list of grounds for persecution is closed, thus climate refugees do not fall under the protection of the Refugee Convention, since climate change cannot be considered as persecution. Ultimately, climate refugees are not protected by the existing international legal regime, and, as it has been observed, there is no special institution with the mandate to assist them.

While the current research has shown that the Refugee Convention in its present shape can not be applied for the protection of people induced to migrate due to climate change, it has also demonstrated that in some countries the issue of climate induced cross-border displacement is extremely urgent. Bangladesh, being under enormous amount of pressure as a result of climate change related problems, is at the same time representing a significant threat to neighboring countries by the current number and especially, potential number of climate refugees. India seems to be the number one target to which the Bangladeshis relocate. Thus, both countries need to regulate this climate refugee issue, and find some instrument which can guarantee the protection of displaced persons while, observing the host state’s interests. The fact that neither India nor Bangladesh has ratified the Refugee Convention shows an ignorance of the refugee problem in general. With regard to climate refugees, ratification of the Refugee Convention is not the remedy, due to the previously stated conclusion that it is unable to address the demands of climate refugees.

The fact that the issue of climate induced migration is globally recognized can be proved by the ongoing debates concerning the ways to tackle the problem and by the number of proposed solutions. The most recognized and supported suggestions on how to protect climate refugees are: the extension of the refugee definition within the Refugee Convention, the amendment of a separate Protocol to the UNFCCC, and the creation of an entirely new convention focused on climate refugees. During this thesis, the strong and the weak parts of these suggestions were analyzed. Ultimately, all these proposals were tested on the India –

Bangladesh' case. This allowed the identification of a solution which seems to be the most suitable and realistic one for the protection of people at risk of climate-induced cross-border displacement. Specifically, a separate Protocol to the UNFCCC seems to be the most effective way to tackle the problem. First of all, the UNFCCC has vast support from member states, and a lot of developing countries affected by climate change, such as Bangladesh and India are currently among its parties. Secondly, the institutional regime under UNFCCC is already established, functioning, and there is even an international arena, such as Conference of the Parties, where this proposal can be introduced and discussed. Furthermore, the fact the new Protocol will be based on the principle of common but differentiated responsibilities, which is currently imbedded into the UNFCCC, makes the Protocol to the UNFCCC a realistic option.

Climate change is not only destructive for the environment: it also has a direct effect on human lives. The United Nations Human Rights Council has recognized that climate change “poses an immediate and far-reaching threat to people and communities around the world”. These people, who will have to relocate to other countries due to the effects of climate change, are going to suffer significant infringement of the most basic human rights but, at the same time, they are introducing a huge threat for the rest of the international community. Therefore, if the world does not want to fall into chaos, we need to adopt an instrument to settle the problem as soon as possible. The rate of climate change does not leave any time for procrastination and 2050 is indeed not so remote.

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