

CLIMATE CHANGE-RELATED DISPLACEMENT AND THE DETERMINATION OF REFUGEE STATUS UNDER THE 1951 REFUGEE CONVENTION

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ELIJAH S. SRITHARAN

University of Maribor, Faculty of Law, Maribor, Slovenia
elijah.sritharan@gmail.com

CORRESPONDING AUTHOR

elijah.sritharan@gmail.com

Abstract Climate change and climate-driven migration are two of the defining challenges of the twenty-first century, and there is no legal framework for protecting those displaced across national borders for climate-related reasons. The 1951 Refugee Convention hardly applies to human mobility in the context of climate change. This paper was written in the hopes of initiating a discussion concerning an alternative perspective through which persons fleeing natural disasters linked to climate change may satisfy the eligibility conditions for recognition of refugee status. Expanding the definition of refugee as defined in the Convention by including the notion of vulnerability to climate disasters that are caused by the underlying socio-economic conditions in the claimant's home country and the role of discrimination in causing differential exposure to the climate-related disasters in legal definitions might open the door for the availability of refugee status for persons fleeing in the context of climate change. This paper proposes the adoption of a reformed human rights-based interpretation, particularly with regard to the individual nature of refugee status determination. Recalibrating the Convention to facilitate climate-induced migration could reduce political tension and social unrest in receiving countries.

Keywords

climate change,
climate-driven migration
or displacement,
climate migrants or
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determination of refugee
status,
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human rights-based
approach,
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conditions,
vulnerability to climate
disasters,
the role of
discrimination,
rights-based climate
litigation

1 Introduction

It is widely recognised that the planet faces serious environmental challenges that can only be addressed through international cooperation. Two of the biggest challenges facing the world today are climate change and climate-driven migration. The two phenomena are strongly intertwined. The latest Intergovernmental Panel on Climate Change (IPCC)¹ report warned that major climate changes are inevitable and irreversible due to the carbon already released by human activities.² However, there is an obvious divide between who has caused climate change and who is suffering its effects. Climate change impacts may take the form of sudden-onset events or extreme weather events such as floods, droughts or hurricanes, as well as slow-onset processes like sea-level rise, increasing temperatures, land and forest degradation, desertification and coastal erosion (Bodansky, Brunnee and Rajamani, 2017: 314).

There is a clear link between climate change impacts and displacement. The drivers of cross-border displacement are multi-causal, individual mobility decisions are multi-faceted, and other social, economic, and political factors, play important roles. Apart from conflict, persecution, poor governance and serious human rights abuses, people migrate owing to extreme poverty, social inequality and rapid urbanisation (Goodwin-Gill, McAdam and Dunlop, 2021: 637-638).

Climate change-related events have now joined the list of the top drivers of human mobility (Kohl 2022: 67). Climate change is often described as a threat multiplier, as it both displaces people and intensifies other factors, including degraded environments, income instability, resource limitations like access to

¹ The IPCC (the world's leading authority on climate science) was established by the United Nations Environment Programme (UNEP), the World Meteorological Organisation (WMO), and the World Health Organisation in 1988 to synthesize research on climate change. IPCC reports intended to provide policymakers with regular scientific assessments on climate change, its implications, and potential future risks, as well as to put forward adaptation and mitigation options.

² IPCC (2021) 'Contribution of Working Group I to the IPCC Sixth Assessment Report' (AR6), *Climate Change 2021: the Physical Science Basis*. Cambridge: CUP.

drinking water, inadequate sanitation, crop failures owing to rising temperatures or changing rainfall, livestock survival and lack of affordable healthcare, that trigger human migration and creation of refugees (Vince 2022: XVII). This, in turn, may threaten a range of human rights, including the right to life, health, housing, water, sanitation, food, self-determination, culture, and development (Bodansky, Brunnee and Rajamani, 2017: 301).

The 2015 migration crisis saw an influx of people equivalent to just 0.5 per cent of Europe's population, resulting in political tension and social unrest (Taiken, 2020: 187). The International Organisation for Migration estimates that there could be as many as 1 billion environmental migrants in the next thirty years alone (Vince, 2022: XV). The World Bank has come up with a figure of 216 million people who will be internally displaced by 2050 due to slow-onset climate breakdown impacts. This figure does not include either Europe or North America (Taiken, 2020: 187; McGuire, 2022: 124). Although the numbers are often disputed, and the exact number of people that will be on the move by mid-century is uncertain, it is pretty safe to say that in coming decades, climate change will force millions of people to leave their homes in search of viable livelihoods and safety. Despite predictions of such startling magnitude, there is no single legal framework for protecting those displaced across national borders for climate-related reasons (Miller, 2017: 23).

Forced climate migrants may fall outside of the refugee law paradigm and there is considerable resistance to expanding the definition of refugee as specified in the 1951 Refugee Convention³ to incorporate "climate refugees". The protection needs of those displaced across borders in the context of climate change require a radical rethink, particularly with regard to the specific considerations relevant to the individual nature of refugee status determination.

³ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

Using an evolutionary approach by which the need to consider the broader socio-economic and political characteristics of the effects of climate change and their potentially significant adverse impact on state and societal structures and individual well-being and the enjoyment of human rights are taken into consideration when assessing asylum claims, the relevance of the Refugee Convention to the predicament of displaced persons becomes more distinct (Goodwin-Gill, McAdam and Dunlop, 2021: 642-643). In claims in which a person's exposure to detrimental environmental conditions directly or indirectly involves systemic violations of economic and social rights, care must be taken to examine the particular features of the case. Much-needed attention to understanding the notion of human and social vulnerability caused by socio-economic conditions and the role of discrimination in causing differential exposure to climate disasters is relevant to determining refugee status (Scott, 2020: 15-28).

The first part of the paper (Section 2.1) provides an overview of the prevailing perspective of how the Refugee Convention is often interpreted in the context of climate change. Section 2.2 explores an alternative "rights-based approach", by which the decision-maker assesses the asylum claim in light of socio-economic conditions in the claimant's home country as well as the relevance of systemic denial of human rights when determining who is, or is not, entitled to refugee status. Section 3 reviews the linkages between the international climate change legal regimes and other branches of international law. The climate change problem intersects a multitude of other areas of international law and it can thus be understood in many ways: as a human rights problem, as an environmental problem, as an economic problem or as a social problem. Finally, section 4 looks at emerging practices and jurisprudence in pursuing rights-based climate litigation at domestic levels.

2 Basic Principles of International Refugee Law

2.1 The Prevailing View under the 1951 Refugee Convention

To be recognised as a refugee under the Refugee Convention, a person must establish that he or she is a person to whom the definition of Article 1A(2) applies, and under Article 1A(2) of the Refugee Convention, a refugee is defined as someone who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and 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."⁴

The current view expressed by the judicial authorities⁵ and prominent scholars of international refugee law (McAdam, 2012: 46; Goodwin-Gill, 2021: 636-668; Scott, 2020: 45) is that the Refugee Convention hardly applies to human mobility in the context of climate change. According to this view, climate-related harm is a phenomenon that is quite distinct from persecution. In other words, climate-related harm cannot be characterised as persecution because the role of human agents is entirely absent. As McAdam frames this, 'part of the problem in the climate change context is identifying a "persecutor"' (McAdam, 2012: 45).

Therefore what persecution means is crucial to understanding the scope of the refugee definition. Unfortunately, the term "persecution" is not defined in the 1951 Refugee Convention. Since the concept has not been defined, perhaps the drafters wanted to introduce a flexible concept which might be

⁴ Article 1A (2) of the 1951 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁵ *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4, [1997] 190 CLR 225; *Horvath v Secretary of State for the Home Department* [2000] UKHL 37, [2001] AC 489; *Canada (Attorney General) v Ward* [1993] 2 SCR 689.

applied to circumstances as they might come about or that the concept is freely completed by the latest jurisprudence on socio-economic persecution examples. Justice McHugh, in *Applicant A v Minister for Immigration and Ethnic Affairs*, assists with his clarification of the meaning of the term persecution for a Convention reason under the Refugee Convention:

"Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group."⁶

This broad description recognises the importance of discrimination in the predicament faced by the refugee claimant. The prevailing view is that climate change impacts lack the essential discriminatory quality of the refugee definition that underpins all forms of persecution under the Refugee Convention, and thus people fleeing in the context of climate change are not refugees. Even if the indiscriminate nature of climate impacts could be characterised as persecution, the Refugee Convention requires such persecution to be for reasons of an individual's race, religion, nationality, political opinion, or membership of a particular social group (Scott, 2020: 3).

Having said that, switching the notion of 'being persecuted' with that of 'being subjected to serious human rights violations' or 'being exposed to serious denials of human rights' may open the door for the availability of refugee status for persons fleeing in the context of an area affected by a climate disaster. The vast majority of refugee cases that arise in the context of climate change do not reflect an express concern articulated by the claimant about being exposed to disaster-related harm if returned; rather, the disaster forms the backdrop to the claim (Goodwin-Gill, McAdam and Dunlop, 2021: 644). In most of the claims, the claimant does not cite any

⁶ *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4, [1997] 190 CLR 225.

evidence pertaining to natural disasters linked to climate change. The human rights perspective emphasises that climate change is inherently discriminatory: its effects will be felt disproportionately by those who are already among the poorest, the marginalised, and the least powerful, and who have done the least to contribute to the crisis (Knox, 2020: 323-347).

Above all, the Northern adjudicator, as a well-read agent, capable of better understanding reality in the global South through its Northern institutions, must go beyond the key elements of the refugee definition when determining claims for recognition of refugee status. For instance, questions need to be asked about particular groups and their distinctive characteristics, their relations with other groups, and how they have come to inhabit the most wretched conditions of the impoverished regions and places affected by environmental natural hazard events. A human rights definition and understanding lead to more adequate responses to the many facets of the climate change problem. Focusing on the human rights that are compromised by the impacts of climate change, rather than on what causes movement, means that complex questions relating to climate change and causation are avoided – which, in any case, are not directly relevant to establishing whether or not a right has been violated (Goodwin-Gill, McAdam and Dunlop, 2021: 640).

After the establishment of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM)⁷ in 2013, the issue of loss and damage associated with climate change impacts, including extreme weather events and slow-onset events, is now considered the third pillar (Broberg, 2020: 1-8) – besides mitigation and adaptation – of climate action under the United Nations Framework Convention on Climate Change (UNFCCC).⁸ The UNFCCC has recognised climate-induced displacement as

⁷ Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (22 November 2013) UN Doc FCCC/CP/2013/L.15.

⁸ UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

having the clearest connection to non-economic loss and damage in comparison to other forms of human mobility, such as voluntary migration or planned relocation (Thomas and Benjamin, 2021: 34). The matter of loss and damage associated with climate impacts in developing countries that are particularly vulnerable to the adverse effects of climate change is addressed in a stand-alone article (Article 8) in the Paris Agreement.⁹ This, in turn, strengthens the legal basis for pursuing remedies aimed at reparation.

At the 2022 Conference of the Parties (COP27) summit in Sharm El Sheikh, a landmark decision was struck to establish a loss and damage fund for countries worst-hit by climate change.¹⁰ It is too early to determine whether the loss and damage provisions of the Paris Agreement will deliver climate justice for the most vulnerable developing countries that are particularly vulnerable to adverse effects of climate change. However, it could be argued that historically-high emitters of greenhouse gases (GHG) (advanced high-income democratic capitalist economies) are the persecutors and that industrialised states (the very countries in which the displaced wish to seek asylum) have legal obligations to protect and assist persons who are forced to flee due to human-made disasters, including climate change. International climate agreements have reflected climate justice repeatedly, emphasising the principle of "common but differentiated responsibilities". But developed countries have failed to live up to their commitment to help their poorer counterparts adapt (Worland, 2022: 42-46). According to the 2022 UN Emissions Gap Report, the world will warm by around 2.8 degrees Celsius (°C) this century with the current carbon-cutting policies in place (McGrath, 2022). That is far greater than the "well below 2°C" that countries agreed to in the Paris Agreement.

⁹ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UN Doc FCCC/CP/2015/L.9/Rev.1.

¹⁰ See "COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries," UN Climate Change News, accessed January 26, 2023, available at: COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries | UNFCCC

The idea of climate justice recognises that adverse effects will have a variable impact depending on factors such as poverty, pre-existing inequalities, gender, age, socio-economic rights and conditions. Richer countries are better able to respond to climate disasters. Simultaneously, they have been the main producers of the GHGs responsible for climate change. Africa's share of the global population is 17 per cent, but the continent generates only 4-5 per cent of GHG emissions. Purporting to address climate change without tackling inequality in a world where 70 per cent of the world's GHG emissions are produced by the 20 per cent richest people simply does not make any sense (Marquardt, 2021: 216-217). Climate justice requires a recognition of the unfair burden placed on those who are the least responsible for climate change yet who will suffer its effects more acutely. The concept of climate justice, therefore, incorporates a strong human rights dimension (Lawson, 2021: 263).

In addition to the notion that the impacts of climate change are largely indiscriminate, people fleeing in the context of climate change would appear to continue to enjoy the protection of the state. The criterion must be whether the alleged lack of protection is such as to indicate that the home state is unwilling or unable to discharge its duty to establish and operate a system for protection against persecution of its nationals. The refugee claimant must show that the persecution that he fears consists of acts of violence or ill-treatment against which that state is unable or unwilling to provide protection (Scott, 2020: 63-87).

When determining who is, or is not entitled to refugee status, climate-related stressors, such as floods, rising temperatures, storms, heatwaves, drought, sea level rise and changing rainfall, are usually dismissed as the bases for justified claims. They are, supposedly, sources of vulnerability beyond social control, which therefore impose no obligation on a government to secure a remedy. Clearly, the impacts of climate-related stressors imagined in these cases are intimately connected to the forces of nature. Provided a state remains willing

to assist victims in disaster situations, such victims will not acquire refugee status upon crossing an international border.

According to the prevailing view, climate disasters cause adversity, which is the unfortunate consequence of the uncontrollable forces of nature, rather than the consequence of existing patterns of discrimination and marginalisation that generate unsafe conditions where individuals are exposed and vulnerable to natural hazards events. There is generally a straightforward acceptance of natural disasters as a result of extremes in geophysical processes. This view recognises that disaster itself is attributed to nature and the direction of the argument is that a state may fail to protect a population from such forces of nature is clearly unfortunate.

The prevailing view fails to adequately describe climate-related disasters because of its inadequate engagement with a range of social, economic and political factors that cause exposure and vulnerability to environmental hazard events. In other words, this view ignores the fact that social and economic factors play a role in individual mobility decisions.

2.2 The Alternative View to the Determination of Refugee Status

The alternative view is that climate warming-related disasters are frequently caused by human actions, and the effects of climate change can be minimised or exacerbated by social policies. According to the latest IPCC report, human activity was "unequivocally" the cause of rapid changes to the climate, including sea level rises, melting polar ice and glaciers, heatwaves, floods and droughts. Disasters are deeply embedded in the social structure of a society. Climate change is caused by a wide range of production and consumption processes, and therefore human beings are largely responsible for it. The burning of fossil fuels is the main source of GHG emissions, which contribute to climate change.

As our emission of GHGs alters the planet's climate system, every region in the world is seeing its impacts through extreme weather events. In a warmer world, many weather extremes are becoming more frequent, more intense, longer and more dangerous. We are all affected, but the poorest and most marginalised among us bear the brunt of the impacts. Rather than understanding the climate-related disaster as a force external to society, it could be understood as a phenomenon produced by society and itself generated from our own system's weaknesses. In other words, Disaster displacement (*i.e.* displacement linked to the environmental and physical impacts of climate change) is a fundamentally social phenomenon caused by societal overreliance on fossil fuels and excessive production of GHGs.

The legal meaning contained in the refugee definition in Article 1A(2) of the 1951 Refugee Convention is a compound conception; it is important not to isolate the elements of the refugee definition, interpret the precise meaning of the constituent elements, and then ask whether the evidential material of many kinds of the asylum claimants are covered by the sum of those individual interpretations.¹¹ However, the potential of human rights law and human rights approaches to provide remedies and thereby fill gaps in the field of climate change law, and litigation has been broadly acknowledged in the literature (Toussaint and Martinez Blanco, 2021: 90-104). Similarly, a "rights-based approach", by which the decision-maker hears the claimant's reasons why he or she is unable to return owing to fear of being persecuted for a Convention reason and assesses the claim in light of all available evidence, including an objective, forward-looking assessment of socio-economic, political and environmental conditions in the claimant's home country as well as the relevance of international human rights law, particularly, the sustained or systemic denial of human rights demonstrative of a failure of state protection, is the best-suited approach to the determination of refugee status in the context of natural disasters linked to climate change.

¹¹ *Ibid.* (n. 10) *Applicant A v Minister for Immigration and Ethnic Affairs* (McHugh J).

Above all, asylum decisions are life or death decisions on complex asylum claims, involving complex areas of law. Thus, all decision-makers on asylum cases must at least have an undergraduate law degree and are supported with extensive training in specialist areas such as climate disaster-related harm claims, before they begin interviewing and making decisions about whether asylum seekers can get international protection or should be sent back to their home countries. This is because the job involves making real decisions which have a real effect on people's lives. If the claim is wrongly refused, it is harder for an asylum seeker to come back from an initial negative decision when their appeal is heard.

Hathaway's treatment of the application of the Refugee Convention in the context of climate-linked disasters deserves attention (Hathaway and Foster, 2014). In this approach, being persecuted is understood with reference to those international human rights instruments. Several binding international human rights law treaties are relevant to environmental problems like climate change – that is, applying already recognised rights, such as rights to life and health, to environmental issues.¹² Therefore, when rights protected under the international bill of rights, namely the Universal Declaration of Human Rights (UNHR),¹³ the International Covenant on Civil and Political Rights (ICCPR),¹⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁵ but also widely ratified instruments, such as the Convention on the Elimination of all Forms of Racial Discrimination (CERD),¹⁶ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁷ the Convention on the Rights

¹² Environmental harm can and often does interfere with the full enjoyment of many human rights, and that states have obligations to protect against such interference. See Knox, H.J. and Pejan, R. (2018) "Introduction" in *The Human Right to a Healthy Environment*, ed. John H. Knox and Ramin Pejan. CUP, p. 3.

¹³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

¹⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 171 (ICESCR).

¹⁶ The Convention on the Elimination of all Forms of Racial Discrimination (adopted in 1966, entry into force 12 March 1969 with 182 States parties).

¹⁷ The Convention on the Elimination of all Forms of Discrimination Against Women (adopted in 1979, entry into force 3 September 1981 with 189 States parties).

of Child (CRC)¹⁸ and the Convention on the Rights of Persons with Disabilities (CRPD)¹⁹, are denied in a way that is sufficiently serious, that may amount to being persecuted. Most of these international human rights law treaties enjoy near-universal ratification (Woerdman, Roggenkamp and Holwerda, 2022: 261).

Climate change interferes with the realisation of internationally recognised human rights. The 2007 Malé Declaration,²⁰ adopted by small island developing states (SIDS), was the first inter-governmental statement to explicitly recognise that climate change has "clear and immediate implications for the full enjoyment of human rights", including the rights to life, to an adequate standard of living, and to the highest attainable standard of health (Atapattu and Schapper, 2019: 208). In 2008, the UN Human Rights Council adopted its first resolution²¹ relating to climate change and human rights and proclaimed that "climate change poses an immediate threat to people and communities around the world, a threat moreover with far-reaching implications for the full enjoyment of human rights" (Chen and Renteln, 2023: 277).

The UN Office of the High Commissioner for Human Rights report, published in 2009, noted that the greatest single impact of climate change could be on human migration, as by 2050, about 150 million people could be displaced by climate change-related events.²² Although the human effects of

¹⁸ The Convention on the Rights of Child (adopted in 1989, entry into force 2 September 1990 with 196 States parties).

¹⁹ The Convention on the Rights of Persons with Disabilities (adopted in 2006, entry into force 3 May 2008 with 182 States parties).

²⁰ Small Island Conference, Malé, Maldives, 13-14 November 2007, Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007); See also Magraw, D. and Wienhöfer, K. (2018) The Malé Formulation of the Overarching Environmental Human Right. In: Knox, J.H., Pejan, R. (ed) *The Human Right to a Healthy Environment*. Cambridge: CUP.

²¹ Human Rights Council Resolution 7/23, Human Rights and Climate Change (UN Doc A/HRC/7/78, 14 July 2008).

²² UN Office of the High Commissioner for Human Rights (UN OHCHR), 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61. The UN OHCHR report identified four displacement scenarios: (a) weather-related disasters; (b) gradual environmental deterioration and slow onset disasters, (c) increased disaster risks and relocation of people from high-risk zones; and (d) social upheaval and violence attributable to climate change-related factors.

climate change have underpinned the climate negotiations, it is the Cancun Agreements²³ in 2010 contain the first explicit reference in climate treaties to human rights as well as migration and displacement, urging states to "fully respect human rights" in all climate change related actions (Bodansky, Brunnée and Lavanya Rajamani, 2017: 326).

2.2.1 The Notion of Vulnerability to Climate Disasters

Disasters are often described as a result of the combination of exposure to a hazard, the conditions of vulnerability that are present, and insufficient capacity to reduce or cope with the potential negative consequences. Disaster impacts may include loss of life, injury, disease and other negative effects on human physical, mental and social well-being, together with damage to property, destruction of assets, loss of services, social and economic disruption and environmental degradation.²⁴ Vulnerability can be understood as the diminished capacities of individuals, communities, or groups in coping with, adapting to, and recovering from hazards, such as environmental degradation or climate change. Often, but not exclusively, economically less well-off people or socially marginalised communities from developing countries are more vulnerable than others (Atapattu and Schapper, 2019: 249).

Vulnerability is the combination of adverse external events and the capacity of a person or group of persons to cope with such events. People's exposure and vulnerability to climate-related disasters are often determined by underlying socio-economic, political, and environmental conditions. Vulnerabilities to disaster relate closely to the social and economic circumstances of people's everyday lives and the position they hold in the structural make-up of their societies. Certain categories of people are at

²³ UNFCCC, The Cancun Agreements, Outcome of the Work of the Ad Hoc Working Group on Long/Term Cooperative Action Under the Convention, UN Doc FCCC/CP/2010/7/ Add.1; Decision 1/CP.16 (10 December 2010) For the first time, a reference was made to human rights at COP16 in Cancun in 2010.

²⁴ This paper adopts the conceptualisation of disaster used by the UN Office for Disaster Risk Reduction (UNDRR).

greater risk of being adversely affected by climate change-induced environmental hazards. According to the alternative view, climate-related disasters happen as a consequence of the interaction of environmental hazards with existing vulnerable social and economic conditions. Climate disasters cannot occur without an extreme hazard event or process unfolding, just as a disaster will not unfold where people are not exposed and vulnerable. For example, without exposed and vulnerable human settlements, a flood will not cause disaster (Scott, 2020: 14-16).

The alternative view also recognises that vulnerability is differently experienced across a population and certain individuals may be more vulnerable than others. For example, climate disasters can have differential impacts even within the same society: some are safer than others, some buildings may be poorly constructed, some have better opportunities and access to information than others, and some are richer than others. In addition, certain individuals and groups within society may be more exposed and vulnerable to disaster-related harm for reasons of race, religion, nationality, membership of a particular social group, or political opinion than others. Therefore, central to this view is the notion of individual vulnerability caused by socio-economic conditions. Many aspects of the social and economic conditions are easily recognised: people's exposure to disaster-related harm differs according to their social class (based on their income, how they live and where), religious affiliations, gender, ethnicity, race, caste, age group, disability, their immigration status and so forth.

People who exist on low-wage jobs (or poor economic conditions) are often forced to inhabit the most wretched conditions of the impoverished regions and places that are affected by environmental natural hazard events, be they the flood plains of rivers or steep mountain slopes (prone to landslides). Vulnerability to displacement may also be heightened by discriminatory state policies and practices.²⁵ Differential exposure and vulnerability to disaster risk

²⁵ Examples of discriminatory State policies and practices may involve non-documentation, the denial or deprivation of citizenship for some ethnic or religious groups that renders them stateless. Their rights as citizens are not fully

results from decisions taken by direct and indirect conduct of State and non-state actors to repress certain political views or expression of certain religious beliefs. The IPCC reports note, "people who are socially, economically, politically, institutionally or otherwise marginalised are especially vulnerable to climate change".²⁶

2.2.2 The Role of Discrimination in Causing Differential Exposure to Harm

The alternative view recognises that discrimination plays a role in causing and exacerbating differential vulnerability and exposure to disaster-related harm. Impacts of discrimination can appear before, during, and in the aftermath of the unfolding of disaster-related harm. Discrimination is inherent in many societies, and people already on the margins of society are made even more vulnerable than others to disaster.²⁷ Discrimination and other structural factors can both cause and exacerbate differential exposure and vulnerability both to the impacts of the hazard event itself as well as to the challenges people face during and aftermath of such an event (Scott, 2020: 23).

Scholars working within the jurisprudence on socio-economic persecution have highlighted the role of discrimination in causing differential vulnerability and exposure in the context of climate change. Decision-makers need to be aware of the deeply social nature of disasters, within which existing patterns of discrimination and marginalisation are exacerbated, and ensure that individual refugee claims are correctly examined within this context. Because the adverse effects of climate disasters exacerbate pre-existing social vulnerabilities and inequalities, children, women, older persons, persons with disabilities, impoverished communities, indigenous people, migrants and

recognised and they may be targeted, not adequately protected, by national authorities. See further Scott, M. (2020) *Climate Change, Disasters, and the Refugee Convention*. Cambridge: CUP, p. 26.

²⁶ IPCC. (2014) 'Summary for Policymakers.' In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate change*. Cambridge: CUP, p. 6.

²⁷ See The International Federation of Red Cross and Red Crescent Societies (IFRC), *World Disasters Report 2007: Focus on Discrimination* (Satigny/Vernier, Geneva: ATAR Roto Presse, 2007).

marginalised groups are more likely to have particular protection needs.²⁸ In other words, people who experience discrimination in everyday life are more exposed and vulnerable to disaster-related harm.

Ethnic and racial divisions exist within nations due to profound structural inequalities. Climate change can exacerbate pre-existing vulnerabilities of populations already at risk. Poverty-stricken groups living in substandard housing, on unstable ground, or in flood plains are usually the principal victims of climate disasters. Often these groups have experienced ongoing discrimination because of their ethnicity, social class (dependent on income, wealth, education, and occupation), and gender, leaving them living in a fragile physical and social environments. When Hurricane Katrina hit New Orleans in 2005, the city's black neighbourhoods bore the brunt of the storm. In 2017, the black districts of Houston bore the full force of Hurricane Harvey (Williams, 2022).

Immigrant communities can be doubly vulnerable: as members of minority ethnic groups, they may be neglected or even persecuted in the foreign country; as foreigners to an area, they lack the knowledge, language and coping strategies to protect themselves (Twigg, 2004). Discriminatory State policies, such as the denial or deprivation of citizenship for some ethnic groups may expose them to disaster-related harm.²⁹ The rejection and resultant poverty of ethnic or religious minorities may push them into a settlement in hazardous locations or to live on unproductive land, while language or educational barriers can limit access to information on risk. Certain individuals and groups may exploit their political connections to receive or distribute aid at the expense of others in countries where corruption and bureaucratic incompetence are widespread. Some individuals may receive little or no aid due to their ethnicity, religious views, political

²⁸ Nansen Initiative (2015) 'Agenda for the Protection of Cross- Border Displaced Persons in the Context of Disasters and climate Change,' accessed February 21, 2023, available at: PROTECTION-AGENDA-VOLUME-1.pdf (disasterdisplacement.org)

²⁹ UNHRC, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons* (29 April 2016) A/HRC/32/35 [77].

ideas, gender identities, or social standing (Fletcher, Stover and M. Weinstein, 2005). This can be seen in differential access to resources, such as information and knowledge, or exclusion from aid relief and possession (or lack) of assets, low savings and social capital between different social groups, and various forms of discrimination that occur in the allocation of welfare and social protection.

Thus, the assumption reflected in the prevailing view that disasters impact indiscriminately is roundly rejected.

3 Climate Change Problem under International Law

Climate change is a complex issue, both in its causes and its effects. It is a good example of an environmental issue where the contribution of states varies considerably, and the ability of states to address it also varies. Practically every aspect of human development contributes to climate change, including energy generation, agriculture, industry and transportation. As a result, climate change flows deeply into the social and economic fabric of states and intersects with a multitude of other areas of international law: human rights law, refugee law, humanitarian law, and trade law. International climate change law is anchored in international environmental law and in rules of general international law on foundational issues such as state responsibility, state sovereignty, and law-making (Bodansky, Brunnee and Rajamani, 2017: 295).

3.1 The Role of International Climate Change Law in Climate Action

Climate change affects the rights of people in vulnerable situations more severely and rapidly, like those in low-lying small island states or the least developed countries, the poor, the elderly and children. It is well established that climate change extensively affects the realisation and enjoyment of

established human rights.³⁰ Global warming could leave many without adequate food, water, and shelter, and threaten their economic and social rights. The adverse effects of climate change are already posing significant threats to human life, livelihoods and traditional cultures in developing countries with a limited capacity to adapt. Kälin and Schrepfer note that at least five general scenarios trigger climate-induced displacement: (1) sudden-onset disasters, (2) slow-onset environmental degradation, (3) Small Island States facing territorial loss due to rising sea levels, (4) high-risk zones for human habitation, and (5) displacement following social upheaval and conflict due to resource scarcity (Walter and Schrepfer, 2012: 13-17).

Solving climate change requires international cooperation. States have the sovereign right to govern the affairs that occur within their territorial areas, including the authority to choose whether to control the emission of GHGs or to take any other action implicated by climate change. While states enjoy sovereign rights to exploit their own resources according to their own environment and development policies within their jurisdiction, such sovereign rights are limited by reciprocal obligations in relation to other equally sovereign states (Sands, *et al.*, 2018: 201-211). International law is based on the sovereign equality principle, but international society is anything but equal (Atapattu and Schapper, 2019: 206). The International Court confirmed in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*³¹ that states have sovereignty over their natural resources, and the responsibility not to cause transboundary environmental damage reflects a rule of customary international law (Crawford, 2019: 343; Sands, *et al.*, 2018: 206; Bodansky, Brunnee and Rajamani, 2017: 41). Principles such as no transboundary harm, prevention, cooperation and the procedural

³⁰ Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007); Human Rights Council Resolution 7/23 Human Rights and Climate Change (UN Doc A/HRC/7/78, 14 July 2008); UN OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61; Human Rights Council Resolution 10/4, Human Rights and Climate Change (UN Doc A/HRC/10/L.11, 12 May 2009).

³¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

requirements of environmental impact assessment are closer to legal rules (Orlando, 2021).

Since the late 1980s, states have developed a significant body of international law in response to the climate change problem. Negotiations on the protection of the global climate system, initiated at the turn of the 1990s, have led to the adoption of three main climate treaties – the 1992 United Nations Framework Convention on Climate Change (UNFCCC),³² the 1997 Kyoto Protocol,³³ and the 2015 Paris Agreement.³⁴ Article 3 of the UNFCCC lists ‘Principles’ intended to guide the parties “in their actions to achieve the objective of the Convention and to implement its provision” (Sands *et al.*, 2018: 199).

Although the UNFCCC does not directly address climate-induced movements, concerns about these problems are arguably addressed in various provisions of the UNFCCC. The preamble of the UNFCCC begins by acknowledging that “change in the Earth’s climate and its adverse effects are a common concern of humankind”.³⁵ The preamble recognised that the duty to cooperate³⁶ extends to the climate context, with Parties “acknowledging that global nature of climate change calls for the widest possible cooperation by all possible countries and their participation in an effective and appropriate international response”. The duty to cooperate is widely viewed as a binding principle of customary international law (Wold, Hunter and Powers, 2009: 154; Mayer, 2022: 103).

³² *Ibid.* (n. 14) The UNFCCC, 9 May 1992, 1771 UNTS 107.

³³ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162

³⁴ *Ibid.* (n. 16) The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UN Doc FCCC/CP/2015/L.9/Rev.1.

³⁵ UNFCCC, Preamble. This was the first time that a ‘common concern’ concept was incorporated into a legally binding instrument. The characterisation of climate change as a ‘common concern of humankind’ was first stated in UNGA Res 43/53, ‘Protection of global climate for present and future generations of mankind’ (6 December 1988) UN Doc A/RES/43/53.

³⁶ The duty to cooperate includes a duty to provide notice and to consult in good faith with neighbouring countries or other countries affected by a state’s activities. See further Rose, C. *et al.* (2022). *An Introduction to Public International Law*. Cambridge: CUP, p. 3-4; Sands, P. *et al.*, *Principles of International Environmental Law*, Cambridge: CUP, p. 213-217.

The most widely-discussed principle of the climate regime is the principle of common but differentiated responsibilities and respective capabilities (CBDRRC), as stated in the preamble and Article 3(1) of the UNFCCC.³⁷ It means that states have a shared responsibility to address climate change, but that some states, because of their historical contribution to causing climate change and their more advanced financial and technological capabilities, have a responsibility to take the lead in tackling the problem. In addition, the UNFCCC Article 3(2) recognises that "specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change...should be given full consideration."

Article 3(3) provides that "Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures".³⁸ The customary law status of the precautionary principle has been confirmed by numerous findings of international courts and tribunals.³⁹

The UNFCCC Article 4.8 further provides that parties should give "full consideration to actions necessary...to meet the specific needs and concerns of developing countries arising from the adverse effects of climate change".⁴⁰ Among these needs and concerns are those relating to climate-induced movements. The parties that raised concerns argued that developed countries

³⁷ The principle of CBDRRC is anchored in UNFCCC Article 3.

³⁸ The precautionary principle states that where there is a threat of serious or irreversible damage, scientific uncertainty should not be used as a reason to postpone precautionary measures to anticipate, prevent or minimise the harm.

³⁹ *Gabčíkovo-Nagymaros Project* (Hungary v Slovakia) (Judgement) [1997] ICJ Reports 7 (*Gabčíkovo-Nagymaros Project*) and *Southern Bluefin Cases* (*New Zealand v Japan and Australia v Japan*) International Tribunal of the Law of the Sea, Order (27 August 1999). See also: Wewerinke-Singh, M. (2019) *State responsibility, climate change and human rights under international law*. Oxford: Hart publishing, p. 44; Sands, P. *et al.*, *Principles of International Environmental Law*, Cambridge: CUP, p. 229-240; Redgwell, C. (2018) International Environmental Law. In: Evans (ed), *International Law*, Oxford: OUP, Ch.22.

⁴⁰ Articles 4.8 and 4.9 focus attention on developing states that are vulnerable to the adverse effects of climate change, including low-lying and small island states, least developed states and states prone to drought and desertification.

have a greater responsibility toward people displaced by the adverse effects of climate change, and therefore are required to give funding and, in some cases, take in the displaced.

The 2015 Paris Agreement recognises loss and damage for the first time in a climate treaty in a separate article on adaptation. Whereas adaptation concerns measures taken to respond to climate change impacts, loss and damage refers to harms that cannot be prevented through climate change mitigation or managed through adaptation. Article 8.1 of the Agreement states that “Parties recognise the importance of averting, minimising and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.”⁴¹ Article 8 of the Paris Agreement reflects international consensus on the notion that some impacts of climate change extend beyond mitigation and adaptation. This recognition could support legal arguments that states have human rights obligations to address the loss and damage associated with climate change impacts, including extreme events and slow onset events, in developing countries that are particularly vulnerable to adverse effects of climate change, and additional obligations to ensure victims’ rights to a remedy for human rights violations associated with climate change (Wewerinke-Singh, 2020: 55).

The preamble to the Paris Agreement contains an explicit reference to human rights⁴². It recognises special interests and vulnerabilities, and is implicitly attentive to the need to create enabling socioeconomic conditions for the effective protection of human rights (Akande, *et al.*, 2020: 323-347). As a result, the Agreement has become the first multilateral climate agreement to recognise states’ human rights obligations, stating in its preamble that “Parties

⁴¹ Both extreme weather events and slow onset events are considered as impacts requiring attention. Also, Article 8.1 recognises the role of sustainable development in reducing the risk of loss and damage.

⁴² The discussion on the human rights recital of the Paris Agreement draws on Lavanya Rajamani, ‘Human Rights in the Climate Change Regime: From Rio to Paris and Beyond.’ In: Knox, J.H and Pejan, R. (eds.) (2017) *The Human Rights to a Healthy Environment*, Cambridge: CUP, p. 236-251; Knox, H. J. (2020) “The Paris Agreement as a Human Rights Treaty” In: Akande, D. *et al. (ed.) Human Rights and 21st Century Challenges*. Oxford: OUP, p. 323-347.

should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous people, local communities, migrants, children, persons with disabilities, and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women, and intergenerational equity" (Wewerinke-Singh, 2020: 51-55).

This statement did not create new human rights obligations, but serves as an important reminder that all Parties to the Agreement must comply with their respective existing human rights obligations when designing and implementing climate change policies. The Agreement makes an important contribution to the fulfilment of human rights. By clarifying that actions to address climate change should take human rights into account

3.2 Prevention of Environmental Harm and Key Environmental Principles of International Environmental Law

Climate change has been conceptualised, from a legal-scholarly perspective, as an environmental problem. A steadily increasing atmospheric concentration of GHGs, and thus a changing climate, can disturb settled patterns of life through changes in weather extremes and shifts in temperature ranges. In other words, an increase in GHGs in the atmosphere fed by incalculable billions of point-source anthropogenic emissions harms the environment. The *sine-qua-non* of the harm that we mean by the harm caused by climate change is always the atmospheric stock of GHGs (Techera, *et al.*, 2021: 490-491).

While the vast majority of the rights and obligations of states with respect to the environment derive from voluntarily assumed treaty obligations, it would be wrong to infer from this that no customary international law norms govern state conduct (Evans, 2018: 683). Under general international law, all states are obligated to prevent significant transboundary environmental harm (the no-harm principle) (Wewerinke-Singh, 2020: 55). The obligation not to harm

another state is clearly meant to limit the extent of each state's sovereign right to develop in any way it wants. The no-harm principle can be traced back to the 1941 *Trail Smelter* Arbitration⁴³ and was included in Principle 21 of the Stockholm Declaration⁴⁴, in Principle 2 of the Rio Declaration⁴⁵ and in the Preamble to the UNFCCC.

The scope of the no-harm principle has been extended to include cases where damage is inflicted on parts of the environment in which all states have an interest (Wewerinke-Singh, 2020: 56). The obligation of states to prevent transboundary environmental harm does not imply a prohibition on engaging in activities that cause such harm. The obligation only concerns the prevention of harm that exceeds a certain minimum threshold. Also, the obligation should be interpreted as an obligation of due diligence (Rose, *et al.*, 2022: 334-336).

The International Court of Justice (ICJ) clarified in its 2010 decision in the *Pulp Mills* Case⁴⁶ that the no-harm principle is, in fact, customary law and emphasised two important features of the principle. First, the no-harm principle encompasses an obligation to take appropriate measures to prevent harm to the environment of other states or to the global commons (the principle of prevention). Second, the principle of prevention, as a customary rule (Evans, 2018: 684), originates in the due diligence standard. Principles, such as no-harm and prevention have notably consolidated into customary norms of international law (Techera, *et al.*, 2021: 20). States are under an obligation to conduct an environmental impact assessment (EIA) to evaluate the effects of their proposed activities on the environment. In its judgement in the *Pulp Mills* case, the ICJ confirmed that the obligation to conduct an

⁴³ *Trail Smelter Case (United States v Canada)* (1941) III RIAA 1905.

⁴⁴ UN Conference on the Human Environment, 'Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN DC A/CONF.48/14/Rev 1, 3, reprinted in 11 ILM 1416 (1972) (Stockholm Declaration). The United Nations Conference on the Human Environment, held in Stockholm in 1972, is usually seen as the catalyst for development of international environmental law.

⁴⁵ UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF.151/26/Rev 1 vol. I, 3, reprinted in 31 ILM 874 (1992) (Rio Declaration).

⁴⁶ *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgement) (2010) ICJ Rep 14.

EIA had become part of customary international law (Crawford, 2019: 343-344; Rose, *et al.*, 2022: 336). In addition, the Court linked the obligation to conduct an EIA to the states' due diligence obligation (Bodansky, Brunnee and Rajamani, 2017: 41).

State responsibility for violating the no-harm principle will only be established when a threshold of damage is crossed. The International Law Commission (ILC), in its Articles on Prevention of Transboundary Harm from Hazardous Activities (ILC Articles on Prevention of Harm), refers to a threshold of significant damage.⁴⁷ It defines "significant" as "something more than detectable but...not at the level of "serious" or "substantial". It adds that "The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States." Most climate change damage – including damage resulting from extreme weather events, sea level rise, droughts, flooding and heatwaves linked to climate change – would seem to be more than insignificant and would therefore meet this threshold (Wewerinke-Singh, 2020: 56-57).

4 Emerging Practice in Rights-Based Climate Litigation

In recent years, climate change is increasingly being litigated in courts around the world and human rights law is starting to play an important role in this type of litigation. States' acts and omissions contributing to climate change can be characterised as a breach of human rights obligations. State responsibility arises automatically upon the occurrence of a breach of such obligations. Citizens have sued their governments for failing to protect them from climate change. Countries have sued fossil fuel companies for their contributions to global GHG emissions and the ongoing increase in damaging weather events.

⁴⁷ International Law Commission, 'Articles on Prevention of Transboundary Harm from Hazardous Activities and Commentaries thereto', 53rd sess, UN Doc A/56/10 (2001) (ILC Articles on Prevention of Harm). See further Roda Verheyen, *Climate Change damage and International Law: Prevention Duties and State Responsibility* (Leiden, Martinus Nijhoff, 2005) 52.

Human rights-based climate litigation can serve to highlight the adverse consequences of climate change for individuals and societies. In a case based on human rights, the emphasis is on the State's right and obligation to protect the rights of its people against infringements by public and private actors. The principle of non-refoulement in human rights law protects people from forcible return to life-threatening circumstances or other inhuman or degrading treatment. However, when determining asylum claims, decision-makers have so far failed to take breaches of economic, social, and cultural rights into account. The deterioration of socio-economic rights induced by environmental conditions linked to climate disasters is identified as inhuman or degrading treatment to which a clear non-refoulement obligation applies (Goodwin-Gill, McAdam and Dunlop, 2021: 647-658). Courts have held that breaches of social and economic rights can amount to inhuman or degrading treatment. However, they have also carefully limited the meaning of cruel and inhuman or degrading treatment so that it cannot be extended to cover claims relating to generalised poverty, unemployment, or lack of resources (Bodansky, Brunnee and Rajamani, 2017: 320).

These obligations were broadly recognised in the *Urgenda v the Netherlands* case⁴⁸, which resulted in three decisions by Dutch courts, and is currently viewed as one of the most important European and global precedents for successful right-based climate litigation. In the *Urgenda* case, the Hague District Court stated that the existence of "a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment" triggered an obligation on the State "to protect its citizens from it by taking appropriate and effective measures". Also, the court held that the fact that the amount of Dutch emissions is small compared to other countries did not affect the state's obligation to take precautionary measures to address climate change. Importantly, there was never a need to prove that climate change is or may be affecting any specific individual person.

⁴⁸ District Court The Hague, *Urgenda and others v the Netherlands* (24 June 2015) ECLI:NL:RBDHA:2015:7145; Court of Appeal The Hague, *The Netherlands v Stichting Urgenda* (9 October 2018) ECLI:NL:GHDHA:2018:2259; Supreme Court, *The Netherlands v Stichting Urgenda* (20 December 2019) ECLI:NL:HR:2019:2006.

To support their claims, the applicants cited a collection of legal bases, including Dutch tort law concepts of “wrongful act” and “endangerment”, constitutional environmental duties of care, Articles 2 and 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the no-harm rule, the precautionary principle and the law of state responsibility (Woerdman, Roggenkamp and Holwerda, 2022: 287). One of the reasons why the *Urgenda* judgments are distinctive is that the courts determined that the Netherlands bears an individual legal obligation to reduce GHGs in a sufficiently safe way as part of the collective effort of implementing the UNFCCC and Paris Agreement. This binding obligation may not exist on the basis of the climate regime but may be understood according to states’ positive obligations under Articles 2 and 8 of the ECHR (Woerdman, Roggenkamp and Holwerda, 2022: 288; Akande, *et al.*, 2020: 346). Moreover, climate change is a slow-onset process and therefore a State party may violate its obligations before the worst effects occur. The *Urgenda* case highlights that the State party is tasked with an obligation to prevent a foreseeable loss of life from the impacts of climate change, and to protect the population’s right to life with dignity.

In the *Teitiota v New Zealand* case,⁴⁹ Mr Teitiota, a Kiribati citizen, was deported to Kiribati, after he lost his case seeking refugee status in New Zealand. The appellant applied for asylum on the grounds that the sea-level rise threatened his home in Kiribati, making it unsafe for him and his family to return. However, the claimant acknowledged that “the Government was taking what steps it could and that the adversity they would be exposed to on return was ‘common to people throughout Kiribati”.

The Supreme Court of New Zealand⁵⁰ concluded that climate-induced displacement did not qualify for refugee status under the 1951 Refugee Convention. The Court noted, however, that “environmental degradation

⁴⁹ *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* (2013) NZHC 3125; *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* (2014) NZCA 173.

⁵⁰ *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* (2015) NZSC 107.

resulting from climate change or other natural disasters could create a pathway into the Refugee Convention or protection person jurisdiction" (Atapattu and Schapper, 2019: 195). Mr Teitota filed a complaint to the UN Human Rights Committee – the treaty Committee responsible for supervising the implementation of the ICCPR, arguing that by deporting him, New Zealand had violated his right to life⁵¹. He stated that if returned, his right to life would be at risk on account of insufficient fresh water, overcrowding, inundation, erosion, and land disputes, stemming from the effects of climate change and sea-level rise (Goodwin-Gill, McAdam and Dunlop, 2021: 650). In its first ruling regarding someone seeking asylum because of climate change, the Committee said that New Zealand's court did not violate his right to life at the time of the facts. Nevertheless, the Committee accepted that, in principle, the effects of climate change could expose people to such risks, and that without robust national and international efforts, the effects of climate change in receiving states may trigger the non-refoulement obligations of sending states and that the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realised, implying that protection should be forthcoming before an immediate risk to life arises. The Committee also clarified that individuals seeking asylum status are not required to prove that they would face imminent harm if returned to their countries. The Committee reasoned that climate change-induced harm can occur both through sudden-onset events and slow-onset processes (OHCHR, 2020).

A third case deals more directly with the protection of a state's own nationals against climate change and obligations to reduce GHG emissions faster. In September 2022, in a landmark decision, the UN Human Rights Committee found that Australia's failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change had violated their rights to enjoy their culture and be free from arbitrary interferences with their

⁵¹ *Teitota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 Oct 2019).

private life, family and home⁵². The claimants – eight Australian nationals and six of their children: all indigenous inhabitants of four small, low-lying islands in Australia’s Torres Strait region – lodged a complaint against the Australian government, claiming their rights had been violated as Australia failed to adopt adaptation measures to climate change as well as mitigation measures to reduce GHG emissions. The Islanders also argued that changes in climate with heavy rainfall and storms have degraded the land and trees and have consequently reduced the amount of food available from traditional fishing and farming. The landmark ruling opens the way for individuals to establish claims where national systems have failed to take appropriate measures to protect those most vulnerable to the negative impacts of climate change on the enjoyment of their human rights (OHCHR, 2022).

Although the legal concept of persecution rests on human agency and it is widely accepted that states have a primary responsibility to protect persons on their territory from serious disaster-related harm and to take steps aimed at disaster risk reduction, however, it is important to be realistic about the state’s capacity to address and mitigate the underlying drivers of the environmental hazards. Thus, in the near future, people fleeing especially, from low-lying small island developing states, where the adverse effects of climate change and disasters form the backdrop to the refugee claims, may well argue that failures of state protection derive from the inability of the state to take steps to reduce the harms that can no longer be managed through adaptation or it is simply not within the power of their governments of low-lying small island developing states and least developed countries to avert the impacts of climate change (when developed countries still rely heavily on fossil fuels).

⁵² See “Australia violated Torres Strait Islanders’ rights to enjoy culture and family life, UN Committee finds,” UN Human Rights Office of the High Commissioner, accessed January 26, 2023, available at: [Australia violated Torres Strait Islanders’ rights to enjoy culture and family life, UN Committee finds | OHCHR](#).

5 Conclusion

Some legal commentators view the 1951 Refugee Convention as not fit for 21st-century global challenges like climate change. The 1951 Refugee Convention was drafted in the wake of the Second World War when millions of people in Europe were on the move as a result of persecution, conflict and violence. The drafters of the Convention certainly were not thinking of environmental problems. Climate concerns did not become an international issue until the late 1980s and early 1990s, when political interest had become strong as a result of increased scientific understanding. Furthermore, few scholars and senior judges would deny the notion of differential exposure and vulnerability to disaster-related harm and the role of discrimination, which are all caused by social, economic and political conditions, play a significant role in individual cross-border displacement decisions, particularly in the context of climate change. Environmental degradation is also closely connected with long-term issues of development and economic and social policy choices. These social and historical consequences of political and economic forces, when mixed with the activity of a discriminatory state response to a situation of a disaster, can, in principle, produce displaced persons who meet the Convention's definition.

The alternative approach does not deny the destructive forces of nature, and it invites consideration of how these interact with exposed and vulnerable social conditions in the unfolding of disaster. The economically disadvantaged people are exposed and vulnerable because they suffer specific relations of exploitation and discrimination within the political economy, and there may be historical reasons why their homes are located in disaster-prone areas. Thus, the relationship between discrimination, exposure and vulnerability to disaster-related harm is significant in determining refugee status. Where a reformed rights-based interpretation of the determination of refugee status is adopted, a window opens for claims where the systemic failures of state actors to protect the victims from the known risks. When climate impacts are understood as failures of state protection, they are clearly

incorporated into the domain of possible circumstances in which a person may establish a well-founded fear of being persecuted for a Convention reason in the context of climate change.

Furthermore, decision-makers and adjudicators must be prepared to hear the subjective fear of the claimant's assessment of his or her situation upon return and to evaluate the claim in light of all available evidence, including the social context, recognising that some individuals may meet the Convention's definition for recognition of refugee status in the context of climate-related harm.

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About the author

Elijah S. Sritharan, PhD candidate at the Faculty of Law, University of Maribor in Slovenia, e-mail: elijah.sritharan@gmail.com