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Wet feet marching: Applying the human rights- based approach to the legal protection gap for climate change displacement

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Abstract

This thesis discusses the international legal protection gap faced by people displaced by climate change. As a growing phenomenon that has potential to lead to grave human rights violations if left unaddressed, the thesis analyses what solutions may be provided to fill this gap. It begins by analysing existing international law such as refugee, human rights and environmental law and its ability to respond to climate change displacement. It also discusses the merits of different types of new laws that could be created to address climate change displacement. The thesis then offers an overview of soft law dealing with climate change displacement and what advantages these pose in providing solutions to the issue. Finally the regional approach adopted in the Pacific is analysed as a possible alternative or complementary governance to the international level. The analysis offered in this thesis is grounded in a human rights-based approach whereby climate change displacees are viewed as the rights-holders in light of the crucial climate justice issue that is climate change displacement.

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'If climate change makes our country uninhabitable ... we will march with our wet feet into your living rooms'.

Atiq Rahman at COP1 in Berlin, 1995

1. Introduction

This year, the United Nations (UN) Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change declared 'displacement due to climate change is one of the greatest human rights threats confronting the international community'¹. As early as 1990, the Intergovernmental Panel on Climate Change (IPCC) declared that the gravest effects of climate change could be on human migration². In 2002, Myers made the now famous prediction that 200 million people will be displaced by climate change by 2050³. More recently, reports have estimated that between 2019 and 2021, 75 million people were already displaced due to 'weather related' events⁴. While the current numbers and predictions still vary, it is clear that climate change displacement is already occurring to some degree and only going to increase. As a rather recent phenomenon, there is currently a major protection gap for people affected by this form of displacement, which this thesis aims to address. While climate change is the overarching cause for displacement, specific weather events, either called 'slow' or 'sudden' onset are what lead to the displacement of people. Slow onset causes for displacement are events such as sea level rise and salinisation of fresh water⁵. These can cause displacement of people living on low lying islands or coastlines, where sea level rise is threatening to submerge an entire part of land underwater. Sudden onset events can include cyclones or floods which destroy homes, infrastructure and can also take lives⁶. While different regions and countries are more vulnerable to certain effects of climate change than others, it is clear that no part of the world is completely safe from it. When people are not able to adapt to climate change events to survive, they are forced to move to other places, thus triggering climate change

¹ Office of the High Commissioner for Human Rights (OHCHR), 'Climate Change Expert Brings Passion, Experience to New Post', OHCHR, accessed 12 July 2023, <https://www.ohchr.org/en/stories/2022/04/climate-change-expert-brings-passion-experience-new-post>.

² Intergovernmental Panel on Climate Change (IPCC), *Climate Change: The 1990 and 1992 IPCC Assessments, IPCC First Assessment Report Overview and Policymaker Summaries and 1992 IPCC Supplement* (Geneve: IPCC, 1992), p. 103.

³ Norman Myers, 'Environmental Refugees in a Globally Warmed World', *BioScience* 43, no. 11 (1993): pp. 752–61.

⁴ Ian Fry, 'Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change', Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change (Human Rights Council: United Nations General Assembly, 23 June 2023).

⁵ UNFCCC (United Nations Framework Convention on Climate Change, 'Synopsis of Technical Paper: Slow Onset Events' (UNFCCC, 2017).

⁶ Ibid.

displacement. While climate change does not discriminate based on location, nationality or social class, it is those in the least ‘developed’ countries that are facing the biggest threat to their safety and livelihood⁷. This is because of confounding factors such as high rates of poverty and lack of infrastructure to mitigate the effects of climate change⁸. As a result, it is the people from these countries that are least likely to be provided a safety net by their government when climate change threatens their life, and they will be forced to move. While many academics, political leaders and the international community at large are aware of this issue, there seems to be little to no protections in place for these people. If they are forced to move within their own country, they may be able to rely on the help of their own government if the resources are available, however if they cross international borders that is not the case⁹. Already, there is anecdotal evidence of cross border displacees having to lie about their cause of displacement because they know that citing climate change as a cause will not grant them legal protection¹⁰. While the media has often called people displaced by climate change ‘climate refugees’ it is not the case that refugee law is protecting these people¹¹. This legal protection gap in international law is what this thesis will analyse with the aim of ascertaining where legal protection may be sought for climate change displaced people, if at all. The research question guiding this thesis is therefore: *How does international law respond to climate change induced displacement and what can a human rights-based approach add to this?* In the absence of an existing international treaty to protect climate change displacees, this thesis aims to understand which international laws have potential to offer protection, whether alternatives may be already available and what possibilities exist for new solutions.

1.1 Definitions

When discussing climate change displacement in this thesis it is important to understand what is meant by this term, and why it was chosen. People who are displaced by climate change have been called many things, from climate refugees or environmental migrants to generally describing the issue as climate mobility¹². While some terms such as ‘climate refugees’ have been used to make a political statement,

⁷ Fry, ‘Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change’, (2023), p. 5.

⁸ Ibid.

⁹ Ibid., 2.

¹⁰ Ian Fry, Interview with the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, 3 May 2023.

¹¹ Angela Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, *Law & Policy* 30, no. 4 (26 September 2008): pp. 502–29.

¹² Fry, ‘Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change’, (2023), p. 3.

others are much more vague. An accurate term that is widely agreed on does not exist however, as there are many complexities with the issue itself. Importantly, there is difficulty in deciding whether people are forced to flee climate change or are moving voluntarily¹³. The difference between slow and sudden onset climate change contributes to this. Some people believe that displacement only occurs when a sudden onset disaster has forced the person to flee due to their life being seriously at risk¹⁴. Others argue that recurring droughts leading to a person being unable to adequately provide for themselves year after year and therefore moving elsewhere also counts as being forced to move¹⁵. Some references are made to three types of mobility in regards to climate change¹⁶. The first type being relocation, which is planned, the second being migration, which is a choice and the third being displacement which is forced¹⁷. Further difficulties arise when discussing a definition as some forms of displacement may only be temporary while others will be permanent. Temporary displacement may occur when a cyclone has forced people to move while their homes are being rebuilt¹⁸. Permanent displacement may occur when sea level rise has made coastal settlements unliveable¹⁹. When people do move, it also matters for definitional and legal purposes whether they cross international borders or only move internally²⁰. Finally, there is a scientific and definitional blurring between environmental disasters and climate change events such as cyclones, flooding and droughts²¹. These events also occur ‘naturally’ regardless of climate change; however, they have also become much more frequent and severe due to climate change. It is therefore difficult to say which event may be a natural occurrence, and which event, or at which point during an event, it is considered climate change induced. All of these definitional issues matter greatly when it comes to considering legal protection for people. This author has decided to use the term climate change displaced people, and to focus on cross border displacement. This is because she believes that the distinction between the types of movement mentioned above (forced vs voluntary) are both applicable to the case of climate change displacement. Climate change being a cause of movement, no matter how well planned out it is, is never truly a choice. If people would otherwise stay on their land and are only moving because

¹³ Bonnie Docherty and Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’, *Harvard Environmental Law Review* 33, no. 2 (1 January 2009): p. 350.

¹⁴ Ibid.

¹⁵ Ibid., 361.

¹⁶ New Zealand Ministry of Foreign Affairs and Trade, ‘The Climate Change Programme’, New Zealand Ministry of Foreign Affairs and Trade, 2019, <https://www.mfat.govt.nz/en/environment/climate-change/supporting-our-region/the-climate-change-programme/>.

¹⁷ Ibid.

¹⁸ Docherty and Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’, (2009), p. 364.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Fry, ‘Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change’, (2023), p. 3.

of a growing or imminent threat of climate change affecting their livelihood, then it will be considered climate change displacement in this thesis. Due to the particular vulnerability of people crossing international borders and losing their state protection, this thesis will focus on cross border displacement. However, it is acknowledged that internally displaced people deserve equal protection. Using the term climate change and not environmental displacees also clarifies that this is a man-made phenomenon which is irregular and not naturally occurring in any way.

1.2 Human rights-based approach

The research question stated above made specific reference to the human rights-based approach. For the climate change displacement issue to be addressed properly, it should be addressed through a human rights lens. While codified human rights laws already exist, human rights as a perspective constitutes much more than this. It is a lens through which to approach global issues such as climate change and displacement and which informs the solutions offered to the problem. Well-supported by climate justice advocates is the idea that climate change displacement should be understood through a ‘rights narrative’ rather than, for example, a ‘adaptation’ narrative²². These narratives are still being heavily debated in the literature, however, at their core, they define how the issue of climate change in the context of displacement should be dealt with. The rights narrative posits climate change displacement as a major concern for the human rights field and considers climate change displacees as inherent rights holders²³. In this sense, the human rights narrative considers states to be the duty bearers and have obligations towards protecting people from climate change displacement²⁴. It also connects to the climate justice perspective as human rights are founded on principles of equality and non-discrimination²⁵. Climate displacement disproportionately affects people from lower socio-economic backgrounds and less developed countries. The human rights narrative acknowledges this and attempts to remedy it by advocating for climate change displacees to be granted equal protection in international law, acknowledging that those displaced are often already the most vulnerable in society. By contrast the adaptation narrative is strong in the environmental science community where displacement is rather seen as a form of adapting to climate

²² Amnesty International, ‘UN Landmark Case for People Displaced by Climate Change’, Amnesty International, 20 January 2020, <https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/>.

²³ Office of the High Commissioner for Human Rights (OHCHR), ‘Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures’ (OHCHR, 2010), p. 2.

²⁴ Ibid.

²⁵ Giovanni Bettini, Sarah Louise Nash, and Giovanna Gioli, ‘One Step Forward, Two Steps Back? The Fading Contours of (in)Justice in Competing Discourses on Climate Migration’, *The Geographical Journal* 183, no. 4 (December 2017): p. 349.

change²⁶. In this narrative, adaptation is seen as a plausible alternative to mitigating the effects of climate change where doing so is not possible²⁷. Moving to a new location as a result of climate change is not inherently seen as a bad thing, as it improves the lives of the people moving. A community may move from their homes for a temporary period if a climate change disaster occurs while they wait for their homes to be rebuilt. This is understood as a form of adaptation by communities in order to survive. While this narrative does not necessarily oppose the rights narrative in the sense that people who move should still be afforded their basic human rights, it does not address the inequality of who is forced to ‘adapt’ through moving and who is not²⁸. Those who are forced to move lose their ancestral lands, ties to the environment and their community. It is the most vulnerable in society who are most likely to be displaced, and therefore also the least likely to be able to adjust to new places well. Accordingly, while it might be appealing to view the issue of displacement as a new way for the human race to adapt to climate change, it does not acknowledge that it is only particular groups affected by this. As wealthier communities or regions can afford to mitigate or better adapt to climate change it leaves the less-privileged and more vulnerable with the burden of having to resettle which is a massive justice issue. The human rights narrative highlights the inherent injustice in climate change displacement and ensures that all humans maintain equal rights including the right to a life of dignity.

1.3 Structure and Methodology

The research question will be answered by using the following structure and methodology.

In Chapter two, this thesis will focus on analysing the existing international laws that could be applicable to the case of climate change displacement. It will do so by reviewing case law, reports and academic articles on refugee, human rights and climate change law. By reviewing these fields of international law, this chapter will contribute to the research question by establishing whether existing law can offer protection to climate change displacees. The end of this chapter will use academic articles and UN reports to discuss the possibility of a new international convention being created to provide legal protection at the international level.

Chapter three will analyse the existing international soft law that could be relevant for providing guidance on protecting climate change displacees. To do this, the chapter will draw on the soft law agreements themselves, as well as academic articles and reports from international organisations. They will be

²⁶ Ibid., 348.

²⁷ Fry, Interview with the Special Rapporteur on the promotion and protection of human rights in the context of climate change on the current status of Climate Change Displacement in International Law (2023).

²⁸ Ibid.

analysed to see how soft law frames climate change displacement and whether they offer any guidance for states to follow regarding providing protection for cross border displacement. This chapter will build on the previous one by discussing how the international community is responding to the issue of climate change displacement beyond agreeing to a legally binding convention.

Finally, Chapter four will use the case study of New Zealand and the Pacific Islands to understand whether legal solutions exist at the regional level. Here, the thesis will reference government websites, regional agreements as well as academic articles to provide insight into the developments happening there. This chapter aims to answer the research question by looking at the possibility for legal protections at the regional level, and ascertaining whether lessons can be applied to the international level.

While the majority of this thesis is based on desk research, the analysis will be complimented by an expert interview with Dr Ian Fry, Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change²⁹. This interview was held as Fry has been very vocal about his concerns regarding climate change displacement. Before taking on the role of Special Rapporteur, he was Tuvalu's Ambassador for Climate Change and Environment where he advocated strongly for better protection for island inhabitants in the face of climate change. The interview was held in May 2023 in anticipation of his first annual report being submitted to the UN General Assembly for review. Having been closely involved with climate change and human rights issues for his entire career, the interview focuses on his opinion of legal developments at the regional and international level regarding climate change displacement, and what he thinks possibilities for development are.

A concluding chapter will provide an answer to the research question and offer possibilities for further research.

1.4 Limitations

It should be mentioned already that this thesis is not without its limitations. Firstly, it is not able to discuss the climate change-conflict-displacement nexus which is a relevant issue in this field. As resources become more scarce, it is predicted that climate change will become a contributing factor to conflict which will in turn increase global displacement³⁰. How this is dealt with in international law is also a human rights issue which further research could analyse. Furthermore, the gendered aspect of climate change displacement was not discussed in this thesis. The gendered nature of climate change

²⁹ Please contact the author for a transcript of this interview.

³⁰ Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches', *UN High Commissioner for Refugees (UNHCR)*, No. 24 of the Legal and Protection Policy Research Series for the Division of International Protection, February 2012, p. 2.

displacement is crucial to understand when discussing legal protection as women are much more vulnerable in situations of displacement than men³¹. Further research is recommended on how a gender lens can be mainstreamed in possible solutions. It would also be interesting to follow developments at the International Court of Justice (ICJ). The ICJ was recently requested by the UN General Assembly for an advisory opinion on obligations of States in respect of climate change³². Whether the final opinion makes any reference to the obligations states may have regarding climate change displacement will have implications worth discussing. As will be expanded on below, Ian Fry's first report as Special Rapporteur was released to the UN General Assembly a short period before the due date of this thesis. It was therefore too early to analyse whether this report, which focused on climate change displacement, will impact international law in any way. The author recommends that this is researched as well.

2. International law approaches to climate change displacement

2.1 Introduction

This chapter will analyse what hard law at the international level could be applicable to the issue of climate change displacement. In this case, the international level refers to fields of law developed under the auspices of the UN. International law is important to analyse as it creates a global standard for states to follow and adhere to, especially when concerning the movement of people across international borders. If individuals or communities are displaced across international borders due to climate change, they become far more vulnerable than moving within their own state. Without being under the protection of their home state they rely on the protection of other states which may not be willing to host them or protect their basic human rights. For this reason, it is crucial to discuss what existing international laws might offer a standard of basic protection for people displaced due to climate change. This chapter will begin by analysing existing refugee law and human rights law in order to ascertain whether legal protection can be gained there. Then, environmental law will be evaluated as to whether it has developed enough to offer protection to people. The last section will look at what new frameworks are being offered in international law, and whether these have any potential to create a global standard of protection instead.

³¹ Rosemary McCarney and Jonathan Kent, 'Forced Displacement and Climate Change: Time for Global Governance', *International Journal: Canada's Journal of Global Policy Analysis* 75, no. 4 (December 2020): p. 657.

³² UN Meetings Coverage and Press Releases, 'General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States' Obligations Concerning Climate Change | UN Press', March 2023, <https://press.un.org/en/2023/ga12497.doc.htm>.

2.2 International refugee law

International refugee law is understandably the field of international law that many assume applies best to the case of climate change displacement. This is due to the fact that, as explained above - people who experience climate displacement are often referred to as climate refugees by the media, politicians, and sometimes also academics³³. It is also because the attempts made so far to recognise climate change displacement have been channelled via the GRC³⁴. This section will therefore outline the basic principles of refugee law, with the purpose of clarifying why this field of law is in fact not well designed for the case of climate change displacement, and discuss whether possibilities exist for it to be better suited to it. In order to understand why international refugee law is not applicable, its history and purpose must first be explained.

While displacement has occurred for millennia, it was the aftermath of World War II that propelled the issue of refugee protection into international law³⁵. The 1951 Geneva Convention relating to the Status of Refugees (GRC) was the first significant international legal instrument on refugee protection and came as a response to the mass displacement of people after the war³⁶. With thousands of Europeans displaced due to the loss of their homes and persecution by their governments, the GRC came as an urgent reaction to the growing refugee crisis³⁷. The GRC provided a comprehensive framework for defining who could be considered a refugee and offered them protection³⁸. It specified the rights that refugees should be entitled to in the host country, such as the right to work, education, and housing, and it established the principle of non-refoulement³⁹. The 1951 GRC was limited, however, in that it was only concerned with events occurring before 1951, with a focus on the European crisis, unless signatory states declared otherwise⁴⁰. Therefore, when States realised that the need for refugee protection was expanding beyond the aftermath of World War II, an additional Protocol to the GRC was written. This Protocol, known simply as the 1967

³³ Bayes Ahmed, 'Who Takes Responsibility for the Climate Refugees?', *International Journal of Climate Change Strategies and Management* 10, no. 1 (1 January 2017): pp. 5–26.

³⁴ Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law', *Law & Policy* 30, no. 4 (26 September 2008): p. 507.

³⁵ Judith Kumin and Frances Nicholson, 'A Guide to International Refugee Protection and Building State Asylum Systems', *Handbook for Parliamentarians N° 27* (UN High Commissioner for Refugees (UNHCR), 2017), p. 16.

³⁶ UN High Commissioner for Refugees (UNHCR), 'The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol' (2011), <https://www.unhcr.org/media/28185>.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Non-refoulement: A refugee's right to be protected from forced return

⁴⁰ Kumin and Nicholson, 'A Guide to International Refugee Protection and Building State Asylum Systems', (2017), p. 16.

Protocol, extended the GRC's application to include refugees from all over the world who were fleeing persecution with no temporal or geographic limit⁴¹. Most states have acceded to both the GRC and the 1967 Protocol, making the rights of refugees almost internationally recognised⁴². Supporting these legal mechanisms is the United Nations High Commissioner for Refugees (UNHCR) which exists to implement international refugee law and ensure states uphold their commitment to the GRC and the 1967 Protocol. While this system of refugee law has been established for some 70 years, it does not yet offer any formal protection for persons fleeing displacement due to climate change. As stated in the GRC, protection is afforded to an individual who has fled their country of origin due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."⁴³ Several aspects of this definition are relevant when applying the case of climate displacement. The first and most important of these is the requirement for someone to be fleeing a well-founded fear of persecution in their home state⁴⁴. While persecution itself is not defined in the GRC, Articles 31 and 33 reference threat to life or freedom of the person in question, assuming this constitutes persecution⁴⁵. The definition also requires that the person not be able to rely on their government for protection and persecution must be for specific reasons such as race, religion or nationality⁴⁶. Ultimately, the list of causes for persecution are finite and cannot be interpreted in a wider margin than what is offered in the GRC.

When considering the case of climate change displacees and their chance of being considered refugees under the GRC, the requirement to be fleeing persecution rules most of these people out from gaining refugee status. While climate change is posing a very real threat to people's lives, its effects are not controlled by one actor who is purposefully trying to harm a certain group. Science has proven that climate change is anthropogenic in nature, its effects are global, and have developed over many years⁴⁷. It is therefore impossible to prove that a single actor has released a certain amount of Co2 with the intention of causing climate change to harm a particular social group. Climate change is of course riddled with

⁴¹ UN High Commissioner for Refugees (UNHCR), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (2011).

⁴² United Nations Treaty Collection, 'Status of Ratification on the Convention Relating to the Status of Refugees', accessed 28 April 2023, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en United Nations Treaty Collection.

⁴³ Kumin and Nicholson, 'A Guide to International Refugee Protection and Building State Asylum Systems', (2017), p. 18.

⁴⁴ Ibid.

⁴⁵ UN High Commissioner for Refugees (UNHCR), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (2011).

⁴⁶ Ibid.

⁴⁷ Kälén and Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches', (2012), p. 4.

inequities, such as the fact that ‘developed’ states have contributed the most to it, while later ‘developing’ states suffer its strongest effects⁴⁸. This however, is not equal to persecution by one actor against others with intention to threaten life⁴⁹. Essentially, climate change induced events are not controlled by one actor that is trying to target people based on their identity. Even if a government knowingly continues to emit more Co2 than the limits set by the UNFCCC, this does not constitute a government persecuting a particular social group. Neglect by a government towards those most affected by climate change is not the same as direct persecution of a particular group either. Furthermore, current evidence shows that ‘home’ governments of people who are most likely to be displaced by climate change have not completely abandoned their people and are still trying to offer some form of protection⁵⁰. This is at odds with the GRC which requires that refugees are not able to rely on their own government for any form of support or protection. Some claims have been made that climate change displacees can still fit the definition of refugee, with an early example being the communities in the African Sahel where it is argued that the local communities have been completely abandoned by their government when it comes to protection from the life threatening effects of climate change⁵¹. As many people living in the Sahel constitute a lower socio-economic group, it is argued that their governments purposely did not take action to protect them because of the socio-economic group they belong to⁵². Consequently this discrimination amounts to persecution⁵³. While there is merit in these arguments, they are built on the shaky foundations of equating neglect by a government to intentional threat to life. It is therefore not surprising that these claims have so far been unsuccessful in applying for refugee law protection.

The most famous claim for refugee status on the basis of climate change was made in New Zealand and was brought forward by Ioane Teitiota from the island state of Kiribati⁵⁴. Kiribati is an archipelago of small islands in the Pacific where sea level rise is predicted to quadruple the global average, leading to coastal erosion, salinisation, and predictions that most islands could be submerged by 2050⁵⁵. Mr Teitiota migrated to New Zealand in 2007 after not being able to find work in Kiribati and not being able to

⁴⁸ David Hodgkinson et al., ‘Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses’, *IOP Conf. Series: Earth and Environmental Science* 6 (1 February 2009).

⁴⁹ Kumin and Nicholson, ‘A Guide to International Refugee Protection and Building State Asylum Systems’, (2017), p. 18.

⁵⁰ Williams, ‘Turning the Tide’, (2008) p. 509.

⁵¹ *Ibid.*, 508.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Supreme Court of New Zealand, *Ioane Teitiota v The Chief Executive of Ministry of Business Innovation and Employment* - SC 7/2015, No. NZSC 107 (Supreme Court of New Zealand 2015).

⁵⁵ Xing-Yin Ni, ‘A Nation Going under: Legal Protection for Climate Change Refugees’, *Boston College International and Comparative Law Review* 38, no. 2 (2015): p. 330.

survive off subsistence farming and fishing⁵⁶. After overstaying his work permit in New Zealand, he applied for “climate change refugee status” and pursued his case all the way to the Supreme Court of New Zealand⁵⁷. Mr Teitiota argued that the rising sea level and environmental degradation forced him and his family to leave Kiribati, as they were no longer able to provide for themselves⁵⁸. In applying for refugee status, Mr Teitiota had to establish persecution against him and his family in his home state⁵⁹. This was difficult as his threat to life was caused by climate change - a non human actor. While persecution has never officially been defined, the New Zealand courts interpret persecution under a common understanding that it is a ‘sustained or systemic violation of basic human rights demonstrative of a failure of state protection’⁶⁰. Threat to Mr Teitiota’s human rights clearly does not fit this understanding of persecution, as he admitted that Kiribati’s government had been willing to take all possible steps to fight the adverse effects of climate change. Mr Teitiota and his lawyer argued to expand this understanding of persecution to consider the harms caused by the international community at large, as so many states had made such a significant contribution to climate change that Kiribati was unable to fight its effects successfully⁶¹. This argument was problematic however, as under this logic, Mr Teitiota would be seeking protection from persecution in one of the countries that - as part of the international community, would be considered one of the persecutors⁶². The courts did not accept this argument as it clearly does not fit with the understanding of persecution considered under the GRC, and doing so would broaden the scope of the GRC significantly. The courts did not fully discredit the argument that climate change refugees could exist however, saying that climate change can lead to conflicts, whereby a person fleeing that conflict would be considered a refugee under the convention⁶³. This is not a groundbreaking comment, as it only considers the conflict as the legitimate reason for someone being forced to flee, and not the actual climate change. Furthermore, this statement could have perverse consequences as, some argue, it essentially offers protection to those who are involved in a conflict, but not those who choose to work cooperatively to deal with the threat of climate change⁶⁴. While the Supreme Court did not find that New Zealand’s refugee law extends protection to a person who faces climate change displacement, they did acknowledge the real threat to I-Kiribati livelihood. However they noted that if the definition of refugee was to be

⁵⁶ Supreme Court of New Zealand, *Ioane Teitiota v The Chief Executive of Ministry of Business Innovation and Employment* - SC 7/2015.

⁵⁷ *Ibid.*, para 4.

⁵⁸ *Ibid.*, para 5.

⁵⁹ *Ibid.*, para 6.

⁶⁰ Avidan Kent and Simon Behrman, ‘The Teitiota Case and the Limitations of the Human Rights Framework.’, *Questions of International Law* 7 (2020): p. 29.

⁶¹ *Ibid.* 31.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

extended to climate change displacees, it would potentially open the “floodgates” for thousands of climate change displacees to apply⁶⁵. This follows concerns at the international level and by the UNHCR itself that there is a risk of widening the definition refugee as it may weaken the general status of refugee rights if many millions more are granted this protection⁶⁶. Ultimately, the Supreme Court rejected Mr Teitiota’s claim for refugee status, stating that ‘while Kiribati undoubtedly faces challenges, Mr Teitiota does not, if returned, face serious harm and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can’⁶⁷. This case is a prime example of how ill-prepared refugee law is to protect climate change displacees. Refugee law was written with the express purpose of protecting a certain group of people and has remained steadfast in its 1967 definition of a refugee. Where anti-refugee sentiment is already high, expanding this definition has little to no support from governments who fear that expansion would open the ‘floodgates’ of refugees coming to their country⁶⁸. As the UN predicts that up to 250 million people could be displaced by 2050⁶⁹, it seems unlikely that the UNHCR with its already over-stretched capacities will allow more people to fall under their mandate. The nexus between climate change and conflict offers the possibility for climate change displacees to be recognised in international law. While this paper does not have scope to cover that nexus, there is an important emerging field of research on the connection between climate change and conflict⁷⁰. Conflict fuelled by a lack of natural resources is already occurring and is only likely to increase, meaning that people fleeing this sort of conflict are more likely to be considered climate refugees in the future. This nexus deserves further research.

Overall, this section has shown that international refugee law is not applicable to the case of climate change displacement. It does not seem likely that the GRC will expand anytime soon, making this field of law generally inapplicable in the case of climate change displacement. This is unfortunate for climate change displacement as refugee law is well-developed and widely recognised, making it a strong protection mechanism for those to whom it is applicable.

⁶⁵ Williams, ‘Turning the Tide’, (2008) p. 509.

⁶⁶ Filippo Grandi and the UN High Commissioner for Refugees, ‘Climate Change and Disaster Displacement’, UNHCR, accessed 7 May 2023, <https://www.unhcr.org/what-we-do/how-we-work/environment-disasters-and-climate-change/climate-change-and-disaster>.

⁶⁷ Supreme Court of New Zealand, *Ioane Teitiota v The Chief Executive of Ministry of Business Innovation and Employment* - SC 7/2015, para 12.

⁶⁸ Williams, ‘Turning the Tide’, (2008) p. 509.

⁶⁹ Bayes Ahmed, ‘Who Takes Responsibility for the Climate Refugees?’, *International Journal of Climate Change Strategies and Management* 10, no. 1 (1 January 2017): p. 2.

⁷⁰ Sanjula Weerasinghe, ‘In Harm’s Way: International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change’, Legal and Protection Policy Research Series (UNHCR, December 2018), p. 2, <https://www.unhcr.org/media/37759>.

2.3 International human rights law

International human rights law, broader in nature than international refugee law, enshrines the basic human rights of every person into law. The key principles underpinning human rights law are that all human rights are universal, inalienable and indivisible⁷¹. This means that human rights treaties such as the Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are just as applicable to displaced persons as they are to anyone else⁷². When it comes to climate change displacement, specific rights that are enshrined in the Bill of Rights are particularly relevant for climate change displacees. Most importantly, these rights are the right to life, and the right to not be subjected to torture or degrading treatment (Article 6 and 7 of the ICCPR respectively)⁷³. Other important rights include the right to water, food, good health and housing. These are relevant because they belong to the Bill of Rights which adheres to the non-refoulement principle first introduced in the GRC. The principle of non-refoulement is considered a rule of customary international law which means it is binding in all states, regardless of whether they have acceded to the GRC or 1967 Protocol⁷⁴. The ICCPR in particular considers this principle of non-refoulement and clearly states that a displaced person whose life is at risk, or who is at risk of torture in their home state, may not be returned to that state from the country they are currently residing in⁷⁵. This interpretation of the principle of non-refoulement under the ICCPR intends to protect those people who do not qualify for refugee status, yet whose fundamental human rights are still threatened. When a person is residing in a state other than their own, the host state has an obligation to ensure that the person would not be at risk of experiencing irreparable harm if they are returned⁷⁶. Irreparable harm in this case refers to Articles 6 and 7 of the ICCPR being violated. This obligation is a form of complementary protection to refugee law, and can work as an alternative to the GRC⁷⁷.

⁷¹ Office of the High Commissioner for Human Rights (OHCHR), ‘What Are Human Rights?’, OHCHR, 2023, <https://www.ohchr.org/en/what-are-human-rights>.

⁷² Ibid.

⁷³ United Nations General Assembly, ‘International Covenant on Civil and Political Rights’ (Treaty Series, vol. 999, December 1966), pp. 4–5, <https://www.ohchr.org/sites/default/files/ccpr.pdf>.

⁷⁴ United Nations, *Report of the International Law Commission Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016)*.

⁷⁵ Human Rights Committee, ‘General Comment No. 31 (80), The Nature of the General Legal Obligation Imposed on States Parties to the Covenant : International Covenant on Civil and Political Rights : Adopted on 29 March 2004 (2187th Meeting) / Human Rights Committee, 80th Session’, 2004, p. 5.

⁷⁶ Ibid.

⁷⁷ Sumudu Atapattu, ‘Climate Change and Displacement: Protecting “Climate Refugees” within a Framework of Justice and Human Rights’, *Journal of Human Rights and the Environment* 11, no. 1 (24 March 2020): pp. 86–113.

If climate change displaces cannot be given refugee protection, they may hope to be protected under this non-refoulement principle of the ICCPR, and must prove that their life would be under serious threat, or that they may be subject to inhuman or degrading treatment upon return to their home state⁷⁸. In the case of climate change, it is very likely that a threat to life will occur, and that even before this, persons might be subject to degrading treatment. An obvious example of threat to life is sudden onset climate change such as a hurricane which - in case people have not adapted sufficiently, can lead to serious harm or death⁷⁹. With slow onset climate change, the right to life is jeopardised too. Due to water temperature increase in some areas, or the process of increasing salinisation, the spread of waterborne disease becomes more likely, which could put people's health and therefore life at risk⁸⁰. While these are basic examples, there are many ways in which the result of slow or sudden onset climate change could result in premature loss of life if adequate measures to combat it are not in place. To support this, the UN Human Rights Council has stated its awareness of the threat that climate change has on the full enjoyment of human rights, yet it has been criticised for not taking enough action on the issue⁸¹. The Human Rights Committee under the ICCPR also stated that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life"⁸². The case could also be made that when several 'lesser' human rights are all threatened by climate change, it may culminate in the right of Article 6 being impaired and therefore the principle of non-refoulement would apply⁸³. In theory, these 'lesser' rights (lesser only because there is no existing jurisprudence suggesting that they alone could trigger non-refoulement responsibilities), could be the right to water, food, health, and housing which are all enshrined in the Bill of Rights. When examining the effect of climate change on vulnerable groups, triggers for their displacement are very often caused by lack of fresh drinking water, an inability to grow crops, and destroyed homes due to climate change⁸⁴. For example, the Human Rights Council has received reports on how "the climate crisis is severely threatening the enjoyment of the right to adequate

⁷⁸ Ibid.

⁷⁹ World Health Organisation, 'Climate Change and Health', accessed 27 June 2023, <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

⁸⁰ Ibid.

⁸¹ Philip Alston, Special Rapporteur on extreme poverty and human rights, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (Human Rights Council: United Nations General Assembly, 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/218/66/PDF/G1921866.pdf?OpenElement>.

⁸² Human Rights Committee, 'General Comment No. 36 on Article 6: Right to Life' (International Covenant on Civil and Political Rights, 2019), p. 13, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/261/15/PDF/G1926115.pdf?OpenElement>.

⁸³ Human Rights Committee, 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016' (International Covenant on Civil and Political Rights, October 2019), https://www.cambridge.org/core/product/identifier/S0002930000101204/type/journal_article.

⁸⁴ Kent and Behrman, 'The Teitiota Case and the Limitations of the Human Rights Framework.', (2020), p. 27.

housing around the world”⁸⁵. That people in these situations are forced to move is not only a concern of the future but already the case now⁸⁶, which means that human rights law should provide protection to those that have crossed international borders and prevent them from being sent back to unliveable conditions. However, what human rights law should do and what it does in practice, are two very different things, as the first international ‘climate refugee’ case shows. The Teitiota vs New Zealand case, not only referenced refugee law in attempt for protection, but also used the points made above to argue that Article 6 of the ICCPR will be threatened should the principle of non-refoulement not be respected. The case and its consequences are described below.

2.3.1 Teitiota vs New Zealand - General Comment by the Human Rights Committee

As described in the chapter on refugee law, Mr Teitiota is a citizen of the island group of Kiribati who moved to New Zealand to find work in the early 2000’s. After his work permit expired, he was issued a deportation order which he tried to fight in court. At both the High Court and the Supreme Court he and his lawyer attempted to argue for the refugee protection, which was unsuccessful. They also reference Article 6 of the ICCPR, arguing that a deportation back to Kiribati would threaten Mr Teitiota's life because of the adverse effects of climate change⁸⁷. This claim was denied at the Supreme Court in New Zealand, and as a result Mr Teitiota was deported back to Kiribati⁸⁸. After being unsuccessful with his asylum claim in New Zealand, Mr Teitiota and his lawyer decided to pursue the issue at the international level and submitted a communication to the Human Rights Committee of the ICCPR⁸⁹. The Human Rights Committee was therefore tasked with assessing whether New Zealand did in fact violate Mr Teitiota’ right to life by sending him back to Kiribati. The evidence of threat to Mr Teitiota’s life was the same as what was submitted to the national courts in New Zealand, with some additional proof of how Mr Teitiota’s family situation had deteriorated since being deported to Kiribati. The evidence included a lack of fresh or even potable water on the islands, causing one of his kids to get seriously sick; a lack of employment possibilities for Mr Teitiota, and a threat of serious violence caused by land disputes over

⁸⁵ Balakrishnan Rajagopal, ‘Towards a Just Transformation: Climate Crisis and the Right to Housing.’, Fifty-Second Session (Human Rights Council: United Nations General Assembly, 2022).

⁸⁶ Fry, Interview with the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change (2023).

⁸⁷ Supreme Court of New Zealand, *Ioane Teitiota v The Chief Executive of Ministry of Business Innovation and Employment* - SC 7/2015, para 12.

⁸⁸ *Ibid.*

⁸⁹ Human Rights Committee, ‘Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016’ (2019).

remaining usable land⁹⁰. This evidence was deemed sufficient for the Committee to consider whether the impact of climate change and associated sea level rise in Kiribati would impair Mr Teitiota's right to life as a result of his deportation. The committee's response to the case offers important insight into how international human rights law can apply the right to life to the threat caused by climate change.

Firstly, the Committee clarified that the threat to life must be personal and cannot be based on the general conditions of the place the person is being returned to⁹¹. This is problematic because climate change does not target individuals, but rather affects entire geographic areas whereby all people living there may be affected. In the case of Kiribati, it is essentially the entire population of the low-lying island state which is affected, making Mr Teitiota one of thousands of people in the same predicament. However, the Committee did state that the right to life should not be understood in a restrictive manner, and that this right also requires that people are able to enjoy a life with dignity⁹². In other words, simply surviving day-to-day is not adequate, but must go beyond that in order for the right to be fulfilled. The Committee also reiterated that the right to life extends to reasonably foreseeable threats⁹³. This strengthens the idea that the right to life with dignity requires persons to be free from fear, and to enjoy stability and safety. While examining the facts Mr Teitiota presented, the Committee acknowledged that it has been aware for several years of climate change constituting some of the most serious threats to current and future generation's ability to enjoy the right to life⁹⁴. Despite these affirmative comments on how the right to life must be interpreted, and how closely it is linked to the adverse effects of climate change, the Committee analysed the case of Mr Teitiota and came to the conclusion that his right to life had not been violated⁹⁵. The main reasons for this decision are outlined below.

The first reason given was that Mr Teitiota did not provide sufficient evidence to prove that the threat to his life caused by land disputes was personal⁹⁶. The Committee noted a general absence of conflict on the island and that Mr Teitiota himself was never actually involved in any of the land disputes. According to the evidence presented, it appeared that Mr Teitiota was himself alleging a general risk faced by all people in Kiribati, and not only those himself. Therefore, according to the present understanding of the right to life, New Zealand did not violate this right by sending Mr Teitiota back to Kiribati. The next line

⁹⁰ Ibid., para 9.

⁹¹ Ibid.

⁹² Ibid..

⁹³ Ibid..

⁹⁴ Ibid.

⁹⁵ Ibid. para 10.

⁹⁶ Ibid. para 9.

of argument made by the Committee was that there was not enough evidence provided to show that Mr Teitiota's right to life would be threatened by a lack of clean drinking water⁹⁷. The information made available to the Committee was that when fresh drinking water was not available, potable water was provided to all, including Mr Teitiota. While it acknowledged the hardship faced by water rationing, the Committee concluded that the water supply in Kiribati did not produce a reasonably foreseeable threat of a health risk that would impair the right to enjoy a life with dignity⁹⁸. This decision was made despite the additional evidence that Mr Teitiota provided to the Committee proving that his child had contracted a serious disease due to the unsafe water supply on the island. It is therefore clear that the Committee does not deem such a health threat to the child as a serious enough risk to life. The Committee also reflected on the fact that the Government of Kiribati was taking action to fight the adverse effects of climate change on its people⁹⁹. While human rights law does not have the same emphasis on persecution as refugee law does, it weakens Mr Teitiota's claim if his government is taking an active part in trying to protect him. Despite the accepted evidence that Kiribati may be uninhabitable in the next 10-15 years, the Committee deemed this enough time for the government, to mitigate the effects or adapt to climate change, and therefore the foreseeable risk to Mr Teitiota's life was not deemed serious enough¹⁰⁰.

These considerations led the Committee to decide that New Zealand was not in violation of Article 6 of the ICCPR by deporting Mr Teitiota back to Kiribati¹⁰¹. The case shows that at the time of the decision being made, the Committee was not prepared to accept that climate change would constitute a serious threat to life. However, two dissenting opinions were included in the Committee's decision. The first argued that 'the action taken by New Zealand is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all, there are other passengers on board'¹⁰². The dissenting Committee member also said that New Zealand placed an unreasonable burden of proof on Mr Teitiota, and there was real risk of his arbitrary deprivation of life upon return to Kiribati¹⁰³. The member argued that there is a foreseeable risk caused by climate change that the Committee should have taken into account. A second dissenting opinion focused on water issues and argued that 'potable water' is not equal to 'safe drinking water' as enshrined as a right in the ICCPR¹⁰⁴. Potable water can still contain dangerous microorganisms and be detrimental to health, as was indeed the case for one of Mr Teitiota's children. The second dissenting opinion also noted that although the Government of Kiribati had pledged to

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid., para 10

¹⁰¹ Ibid.

¹⁰² Ibid. annex I.

¹⁰³ Ibid.

¹⁰⁴ Ibid. annex II.

improve its resilience to climate change as per the National Development Strategy, the Special Rapporteur on the Human Right to Safe Drinking Water did not find that these goals had yet been implemented. The government could therefore not be counted on to protect Mr Teitiota and his family. These two dissenting opinions address some of the key issues with international human rights law offering protection to climate change displaced people. It is clear that jurisprudence as it stands is not yet equipped to deal with the nature of climate change as an indiscriminate threat to life, rather than something that clearly targets individuals. It is also clear that while a right to a life with dignity is protected in law, it is not the case that the sum of other rights being threatened by climate change is enough to equal a threat to this right. While Mr Teitiota was able to prove that his water was not safe, his family's health at serious risk, and finding land to grow crops led to conflict, these combined threats were not considered to threaten a life with dignity. That being said, the fact that two members of the Committee offered dissenting opinions to the final decision does offer some hope for the development of international human rights law. Both dissenting opinions argued that Mr Teitiota's rights were being violated and that he should therefore be eligible for protection in New Zealand. While these opinions open the possibility for such a case to be interpreted differently in the future, it is clear that human rights law cannot currently offer climate change displaced international legal protection.

2.4 International climate change law

The United Nations Framework Convention on Climate Change (UNFCCC) is a treaty tasked with tackling global climate change and its effects on the planet¹⁰⁵. As the UN Centre for Climate Law, it forms the core part of international climate change law. Initially, the UNFCCC focused on setting binding obligations for states to start mitigating the adverse effects of climate change by reducing greenhouse emissions¹⁰⁶. These obligations are based on the principle of common but differentiated responsibilities, acknowledging that developed countries have a greater responsibility in addressing climate change due to their historical emissions and higher levels of economic development than other countries¹⁰⁷. Now, the organisation also serves as a platform for international cooperation, most notably hosting the Conference of Parties (COP) every year where states from around the world come together to agree on solutions to the climate crisis¹⁰⁸. While initially the focus was on greenhouse gas emissions, the organisation has since

¹⁰⁵ United Nations, 'United Nations Framework Convention on Climate Change', GE.05-62220 § (1992), <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ UNFCCC (United Nations Framework Convention on Climate Change, 'What Are United Nations Climate Change Conferences? | UNFCCC', accessed 28 June 2023, <https://unfccc.int/process-and-meetings/what-are-united-nations-climate-change-conferences>).

broadened its goals significantly, also recognizing that it is too late to completely mitigate climate change and that some level of damage have already occurred which need to be adapted to¹⁰⁹. The issue of displacement has now cropped up in several of the UNFCCC's new soft law agreements, which will be discussed later on in this thesis¹¹⁰. This shows that states are becoming aware of the urgency of the situation, yet such developments have so far not led to a legally binding international mechanism. This is disappointing, as the UNFCCC has potential in international law to recognize climate change displacees and provide them with legal protection¹¹¹. Gibb and Ford are two researchers who argue that the UNFCCC can and should recognize climate change displacees, and is in fact the most relevant international framework for doing so¹¹². They say that the UNFCCC has the mandate to address climate displacement under Article 4 of the Convention, and has already recognised climate displacement issues in its Cancun Adaptation Framework agreement, among others¹¹³. Major advantages of the UNFCCC recognising climate displacement include the fact that the UNFCCC has an established process, expertise and near-universal membership¹¹⁴. They also argue that the existing international funding could be utilised to support this protection¹¹⁵. On the other hand, risks are also associated with having the UNFCCC extend its mandate to displacement protection. They include the concern that a lack of enforcement options would lessen the chance of implementation, and most importantly, the issue of the UNFCCC treating displacement as an adaptation issue¹¹⁶. As explained earlier, the problem with the adaptation perspective is that viewing displacement as adaptation risks ignoring the causes of displacement. They are intrinsically tied to complex social, economic and political factors which influence who is displaced. The adaptation perspective can undermine this and leave the major injustice underlying the climate crisis unaddressed. While the adaptation perspective has gained some support for de-securitising the issue of climate change migration¹¹⁷, it does not go far enough in acknowledging the human rights issues behind displacement. Another common argument against the UNFCCC hosting an agreement recognising climate change displacement is that the UNFCCC is primarily a state-state legal instrument. This means it is much more horizontal in nature than a state-to-individual convention where a

¹⁰⁹ United Nations, 'The Paris Agreement' (2015), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

¹¹⁰ UNFCCC. Conference of the Parties (COP), 'Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010', Cancun Climate Change Conference - November 2010, March 2011, <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

¹¹¹ Christine Gibb and James Ford, 'Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?', *Environmental Research Letters* 7, no. 4 (1 December 2012).

¹¹² Ibid.

¹¹³ Ibid., p. 2.

¹¹⁴ Ibid.

¹¹⁵ Ibid., p. 3.

¹¹⁶ Ibid.

¹¹⁷ Christine Gibb and James Ford, 'Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?', *Environmental Research Letters* 7, no. 4 (1 December 2012): p. 7.

rights-based approach could be applied¹¹⁸. The state-to-state nature of the UNFCCC does not offer much potential for a human rights-based protection mechanism whereby states are considered to have direct obligations towards their people. The 2015 Paris Agreement, which is legally binding under the auspices of the UNFCCC does make subtle reference to climate change displacement. The Paris Agreement calls on states to ‘enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change’¹¹⁹. While it does not detail the ways in which states should specifically support climate change displaced persons, some countries have done so as part of their Nationally Determined Contributions (NDCs). Those countries that have ratified the Paris Agreement are required to submit NDCs every 5 years which specify how that country will make changes in order to meet the criteria laid out in the Paris Agreement. As the Paris Agreement is still relatively new, and the corresponding NDCs have only been submitted once, it is still early days in regards to establishing whether the NDCs have any concrete effect on improving the rights of displaced persons. What is clear already, however, is that the issue of displacement is far more pressing for Global South countries than global north in regards to what they prioritise in their NDCs. The International Organisation on Migration (IOM) found that 33 out of the existing 162 NDCs referred to climate change displacement in some way or other¹²⁰. Of these 33, 46% are located on the African continent, 33% in Asia-Pacific and Oceania and 21% in Latin America¹²¹. The references to displacement focused on 1) managing the displacement of people due to natural disasters and migratory movements linked to climate change; 2) using migration as a possible adaptation strategy to climatic changes through policy measures, and 3) leveraging remittances and financial transfers from migrants and diasporas to contribute to climate action¹²². According to the principle of common but differentiated responsibilities in the UNFCCC, it should be the global north countries who contributed significantly to climate change in general and therefore also addressing the issue of climate change displacement. This lack of responsibility from the Global North, the state-to-state nature of the UNFCCC and the lack of explicit reference to climate change displacement mean that the UNFCCC is currently incapable of providing any legal protection to people affected by this issue.

¹¹⁸ Ritumbra Manuvie, ‘Understanding Climate Migration Governance’, in *Climate Migration Governance and the Discourse of Citizenship in India*, ed. Ritumbra Manuvie (The Hague: T.M.C. Asser Press, 2023), p. 7.

¹¹⁹ United Nations, The Paris Agreement (2015).

¹²⁰ ‘Migration in INDCs/NDCs | Environmental Migration Portal’, accessed 18 April 2023, <https://environmentalmigration.iom.int/migration-indcs/ndcs>.

¹²¹ Ibid.

¹²² Ibid.

2.5 Possibility of a new international convention

The above sections have shown that of the existing legal regimes that might best address climate change displacement, none is yet sufficient in doing so. Each has its merits and offers different possibilities for protection, yet so far there is still no true solution offered for people dealing with climate change displacement. As a result, discussions have been ongoing for several years about whether a new legal mechanism is needed in international law in order to provide protection to people displaced by climate change. Different solutions have been suggested thus far, some arguing for an extension of existing legal mechanisms, others favouring a new convention altogether. This next section will discuss the differing possibilities offered by researchers and politicians and comment on their potential and limitations.

Bierman and Boas suggest that an additional protocol to the UNFCCC on the Recognition, Protection, and Resettlement of Climate Refugees could be a possible solution¹²³. They offer five key principles to serve as the basis of this regime. First, they suggest a principle of planned relocation and resettlement whereby the movement of people due to climate change can be better organised. Science can already tell us to a certain degree what parts of the world are most vulnerable to climate change with the obvious example being low-lying islands that are at risk of sinking, but also other regions such as arid landscapes that are drought-prone¹²⁴. In these cases, unlike refugees who flee conflict, the protection of people can be planned out years in advance and done in a humane and just way. Taking the example of the Pacific Islands, science suggests that some of these islands will only be inhabitable for another 50-odd years¹²⁵. This gives those governments and potential host states time to plan for the inhabitants of these islands to be resettled in a way that works for both those being displaced and for the receiving state/s. Bierman and Boas expand on this with the second principle and suggest that the underlying assumption behind resettlement is that it would be (mostly) permanent, instead of using the temporary refugee mechanism offered in the GRC¹²⁶. Aware of the different needs climate change displacees have to refugees, they think it would be more sustainable to plan for permanent resettlement, and thus guarantee rights for the

¹²³ Frank Biermann and Ingrid Boas, 'Climate Change and Human Migration: Towards a Global Governance System to Protect Climate Refugees', in *Climate Change, Human Security and Violent Conflict: Challenges for Societal Stability*, ed. Jürgen Scheffran et al., vol. 8, Hexagon Series on Human and Environmental Security and Peace (Berlin, Heidelberg: Springer, 2012).

¹²⁴ Ibid., 295.

¹²⁵ Kate Lyons, 'IPCC Report Shows "Possible Loss of Entire Countries within the Century"', *The Guardian*, 9 August 2021, sec. World news, <https://www.theguardian.com/world/2021/aug/10/ipcc-report-shows-possible-loss-of-entire-countries-within-the-century>.

¹²⁶ Biermann and Boas, 'Climate Change and Human Migration: Towards a Global Governance System to Protect Climate Refugees', p. 297.

displaced in the host state. The third principle would accept climate displacees under group status, and not only under the individual status recognised in the GRC¹²⁷. It would likely be that entire villages or cities need relocating, meaning the focus on the individual does not apply. Despite still using the term refugees, the requirement to prove persecution from an actor would also be let go, and displacees would be offered protection based on scientific estimations about their vulnerability to climate change¹²⁸. The final two principles focus on offering international assistance for affected governments and local communities, and the concept of international burden sharing¹²⁹. Both of these principles ensure that the challenges of dealing with climate change displacement are not left to the most vulnerable communities, and build on the existing principle in the UNFCCC of ‘common but differentiated responsibilities’. Biermann and Boas suggest adding a protocol to the UNFCCC not only because it has the obvious link to tackling climate change, but because the UNFCCC already has the political support of almost all countries¹³⁰. As so many states are already party to the UNFCCC, an additional protocol could build on this momentum to address climate change displacement through the principle of common but differentiated responsibilities.

Other authors such as Williams suggest that the best solution to providing protection for climate change displacement is by forming regional agreements that would operate under the UNFCCC¹³¹. Williams argues that having to create a legally binding agreement at the international level is problematic because of the legal definition of refugees having to cross international borders in order to be considered as such¹³². In reality, this distinction is not as relevant for the case of climate change displacement, as many people are displaced internally¹³³. The author also suggests that because the UNFCCC already encourages regional policy development according to specific needs and existing coping mechanisms, regional agreements would fit well with the case of climate change displacement as it affects each region differently¹³⁴. Furthermore, existing regional cooperation that is already ongoing, such as in Africa, could be strengthened by such agreements, and soft law instruments such as those addressing internal displacement could be utilised to support the new regional treaties. Williams also points out that an advantage of such regional agreements would be their ability to match the political will and capacity of the region¹³⁵. In the long run, such regional agreements would ideally filter up to form customary

¹²⁷ Ibid.

¹²⁸ Ibid., 298.

¹²⁹ Ibid. 801.

¹³⁰ Ibid.

¹³¹ Williams, ‘Turning the Tide’, (2008), 509.

¹³² Ibid., 510.

¹³³ Manuvie, ‘Understanding Climate Migration Governance’, (2023), p. 20.

¹³⁴ Williams, ‘Turning the Tide’, (2008), p. 524.

¹³⁵ Ibid., 521.

international law and thereby offer legal protection to displacedes worldwide¹³⁶. While Williams might see these aspects as an advantage, the question must be raised as to whether leaving each region to decide on an agreement for itself puts human rights in question. We know that the global north is less affected by regional climate change displacement because of strong infrastructure that can mitigate the threat posed by sudden and slow onset climate change. Because of this, there is the possibility that regional agreements leave the global south to fend for itself while the global north can wipe its hand clean of the issue. This north-south divide also goes hand in hand with the north having historically released more emissions in order to reach higher levels of development. From a human rights-based perspective it does not seem adequate to say that one of the most affected regions, for example, South America, should be left to come up with solutions to the huge threats posed by climate change, when the most responsible countries do not have to. While the advantage of having regional agreements suited to regional needs is appealing, the basic foundation of non-discrimination in human rights law cannot be disregarded, and any international legal protection offered should ensure equality.

Later work, such as that by Mayer has argued along a similar vein of regional approaches, however, they have mainstreamed human rights concerns¹³⁷. Mayer proposes that a new legal framework on climate change displacement should be based on the principle of subsidiarity which would utilise the efficiency of public policy at the local level while being influenced by an international resolution¹³⁸. This resolution would be adopted at the UN General Assembly and contain guidelines, institutional provisions, as well as a UN agency to coordinate regional agreements. This expands on the ideas of Williams but also acknowledges that legal protection, at least in intention, must first be agreed on at the international level to set a global precedent. This suggestion would address the issue with William's idea of having regions make policy independently by making sure that equal standards are set at the international level. As a sort of umbrella mechanism, more detailed and context specific agreements could then be formed at the regional level.

Ian Fry, when interviewed, also said that he has suggestions for how to fill the legal protection gap for climate change displacedes¹³⁹. At the time of the interview, he had already submitted his first report to the UN General Assembly, to be presented in June. This report was released at the end of June 2023 and

¹³⁶ Ibid., 522.

¹³⁷ Benoît Mayer, 'The International Legal Challenges of Climate- Induced Migration: Proposal for an International Legal Framework' 22, no. 3 (5 February 2011).

¹³⁸ Ibid.

¹³⁹ Fry, Interview with the Special Rapporteur on the promotion and protection of human rights in the context of climate change on the current status of Climate Change Displacement in International Law (2023).

titled ‘Providing legal options to protect the human rights of persons displaced across international borders due to climate change’¹⁴⁰. The report is therefore crucial to the development of this issue, being the first report the Special Rapporteur is submitting as part of his three year mandate. The fact that he chose to focus on climate change displacement in particular when there are so many issues that could be discussed as part of his mandate is indicative of how seriously he believes the problem to be. The report drew on submissions from various countries and civil society organisations who provided input to the recommendations made in the report¹⁴¹. The report discusses existing international hard and soft law, and comes to the conclusion that both are lacking in providing protection. It therefore suggests a new protocol to the GRC for persons displaced across borders by climate change¹⁴². Fry argues in his report and interview that the current GRC comes the closest to offering the type of protection that climate change displacees also need¹⁴³. While he understands that the GRC itself should not be interfered with, nor is there political will to do so, he believes a new protocol is the solution¹⁴⁴. As stated in his interview, the UNHCR is already offering refugee protection to climate change displacees despite them not being formally recognised as such¹⁴⁵. Having a new additional protocol would normalise the existing informal arrangements that the UNHCR is already applying in places like Somalia. While Fry concedes that the UNHCR does not currently have the capacity to deal with climate change displacees, the additional protocol would ensure more resources for the organisation to administer the new additional protocol¹⁴⁶. The report also recommends that the UNHCR should work in collaboration with the Task Force on Displacement, the IOM, UNICEF and other UN agencies¹⁴⁷. In his interview, when asked whether he believes that using the GRC, which is very individual-rights focused, would still work for the group-rights issue of climate displacement he said it would¹⁴⁸. This is an interesting perspective, as so far the GRC is not applicable to groups. As this report was released to the UN General Assembly only a few weeks before the deadline of this thesis, it was too early to analyse whether it will have any political impact. For now it is significant that this report emphasises a strong human rights-based approach while also considering the practical aspects of providing protection to climate change displacees. The report goes in

¹⁴⁰ Fry, ‘Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change’ (2023).

¹⁴¹ Ibid., 2.

¹⁴² Ibid., 1.

¹⁴³ Ibid., 18.

¹⁴⁴ Fry, Interview with the Special Rapporteur on the promotion and protection of human rights in the context of climate change on the current status of Climate Change Displacement in International Law (2023).

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Fry, ‘Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change’, (2023), p. 18.

¹⁴⁸ Fry, Interview with the Special Rapporteur on the promotion and protection of human rights in the context of climate change on the current status of Climate Change Displacement in International Law (2023).

depth in discussing why climate change displacement should be called as such, and how it is a massive human rights issue to ignore it¹⁴⁹. It also discusses why the alternative adaptation perspective is problematic. This is an important advancement in international politics and signals to the international community that the issue is extremely pressing and needs to be dealt with as soon as possible. From an academic standpoint, Docherty and Giannini have designed perhaps one of the most comprehensive international legal protection regimes regarding the issue of climate change induced displacement¹⁵⁰. The authors look at drawing from the best of the GRC and the UNFCCC to make a completely independent convention¹⁵¹. They foresee the hesitation by potential host states to sign such a treaty, out of fear they may attract more displacees, however, they argue that displaced people always find ways to cross borders whether states allow it or not. Therefore by signing a treaty they would at least gain support for the implementation of human rights protections and humanitarian aid, for which they would not otherwise be eligible¹⁵². Home states would also have incentives to sign this new convention because it would provide assistance for remedial measures and help with prevention too. The authors argue that an independent convention is the best option for international legal protection, as it would give the global issue of climate change displacement its own platform, allow for a blending of principles drawn from human rights, humanitarian assistance, and international environmental law, and offer better opportunities for civil society and affected communities to contribute in designing the treaty¹⁵³. Other researchers have also dealt with the question of creating a completely new convention, such as the one by Hodgkinson et al, which offers similar suggestions such as the provision that convention parties would provide for equitable resettlement assistance in accordance with the common but differentiated responsibilities principle and respective capabilities¹⁵⁴. These researchers support the argument that states with the most greenhouse gas emissions should offer the most support to climate change displacees, which would fall under the well-known ‘polluter pays’ principle¹⁵⁵. Such a convention should, according to Hodgkinson et al and other academics, initiate a fund where money from ‘polluter countries’ is used to support home countries, but also the host states¹⁵⁶. This sort of initiative would require a lot of political pressure to get global north

¹⁴⁹ Fry, ‘Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change’ (2023).

¹⁵⁰ Docherty and Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’.

¹⁵¹ Ibid., 350.

¹⁵² Ibid., 365.

¹⁵³ Ibid., 402.

¹⁵⁴ David Hodgkinson et al., ‘Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses’, *IOP Conf. Series: Earth and Environmental Science* 6 (1 February 2009).

¹⁵⁵ London School of Economics and Political Science, ‘What Is the Polluter Pays Principle?’, Grantham Research Institute on climate change and the environment, 2022, <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-polluter-pays-principle/>.

¹⁵⁶ Ahmed, ‘Who Takes Responsibility for the Climate Refugees?’, (2017), p. 17.

countries to cooperate, however, which may slow down the process of forming an agreement. While the above ideas for a new convention on climate change displacement offer a lot of promising solutions, downsides of such a convention do exist. Firstly, a convention of this nature would need to address the recurring issue of a lacking definition. There is no agreement on whether only cross-border displacement should be considered or also internal displacement, to what extent a person needs to be ‘forced’ to be eligible for protection, and whether the displacement is deemed permanent or temporary. Perhaps, a convention that would protect some, would inadvertently neglect others, who are unable to move at all due to inadequate resources to do so¹⁵⁷. Furthermore, it is possible that a convention would take too long to be agreed on at an international level¹⁵⁸. Agreeing on such a convention could not only take years, but for it to be effective, would need a high rate of ratification, and some are concerned that home states of the people most likely to be displaced would sign the treaty in hope of support, while less affected states may not¹⁵⁹. Here the common but differentiated responsibility principle in the UNFCCC should play a role in convincing ‘less’ affected states to sign, on the basis that their emissions obligates them to do so. This principle needs to be treated with caution however, as it can lead to prioritising redress, such as sending displaced persons to the countries that have the highest pollution rates¹⁶⁰, rather than to places where people are most likely to be integrated well. Finally, a convention should not ignore those who cannot move at all, those who are too poor to do so or have intrinsic ties to the land - such as indigenous people¹⁶¹. A new convention, if it is created, should mainstream the human rights-based approach and cannot be treated as an adaptation solution to the climate crisis¹⁶². It should offer protection to the group of people who will be most affected by climate change, but remain strong in its commitment to fighting the climate crisis and mitigating damage. As McAdam said, “A treaty is sometimes posited as the answer to climate change-related displacement, but it is dangerous to see it in this way. Any treaty is necessarily an instrument of compromise and, even once achieved, states must demonstrate sufficient political will to ratify, implement and enforce it”¹⁶³.

¹⁵⁷ Atapattu, ‘Climate Change and Displacement’, (2020), p. 90.

¹⁵⁸ Jane Mcadam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer’, *International Journal of Refugee Law* 23, no. 1 (1 March 2011): 2–27.

¹⁵⁹ Bonnie Docherty and Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’, *Harvard Environmental Law Review* 33, no. 2 (1 January 2009): p. 33.

¹⁶⁰ Ahmed, ‘Who Takes Responsibility for the Climate Refugees?’, (2017), p. 16.

¹⁶¹ Atapattu, ‘Climate Change and Displacement’, (2020), p. 90.

¹⁶² Giovanni Bettini, Sarah Louise Nash, and Giovanna Gioli, ‘One Step Forward, Two Steps Back? The Fading Contours of (in)Justice in Competing Discourses on Climate Migration’, *The Geographical Journal* 183, no. 4 (December 2017): 348–58.

¹⁶³ Mcadam, ‘Swimming against the Tide’, (2011), p. 25.

2.6 Conclusion

This chapter has demonstrated that legal protection for climate change displacement at the UN level is seriously lacking. While many have explored ways in which protection may be gained through various fields of existing international law, it is clear that the issue of climate change displacement does not fit well in any of them. Despite the many predictions of climate change causing displacement, and this already occurring in various places around the world, no real progress has been made to protect people affected by it or to support relocation efforts. There is momentum for alternative options to be developed such as additional protocols to existing conventions, or entirely new conventions altogether. Some of these suggestions have come from academia, while others, such as that of Ian Fry, from people who are members of the UN body. This means that both in academia and in politics momentum is building for new forms of protection to be offered in the case of climate change displacement. However so far this does appear to have made any real impact on international hard law. Soft law on the other hand, may offer some solutions, which will be explored further in the next chapter.

3. International cooperation and soft law approaches to climate change displacement

3.1 Introduction

As the above chapter has demonstrated, there are major protection gaps in existing hard law to accommodate the issue of climate change displacement. A lot of work needs to be done in order for the international legal gap to be filled, and this may take considerable time given the politics involved with developing such laws. Moreover, the human rights-based approach is far from being solidified in international law. Despite this, climate change displacement and the need to find practicable ways of dealing with it have been on the international agenda for several years. As a result, soft law and international cooperation has been developing in order to provide guidance, expertise and support to states dealing with this type of displacement. This chapter will therefore analyse some of the biggest pieces of international soft laws and cooperation initiatives that have formed in the last few years, and analyse how they frame climate change displacement in comparison to international hard law. This chapter will start by discussing the advantages of soft law over hard law in the international sphere. It will then analyse UN level cooperation such as the Cancun Adaptation Framework, the UNFCCC Task Force

On Displacement and the two Global Compacts. Finally, the state-led Nansen Initiative and its succeeding Platform on Disaster Displacement will also be discussed. All of these pieces of international cooperation will be analysed in relation to the human rights-based approach to climate change displacement and whether they can complement hard law on the issue.

3.2. Benefits of soft law instruments and other forms of international cooperation dealing with climate change displacement

International soft law and cooperation initiatives have the common characteristic that they are not legally binding but have been formed through state agreements or by the international community at large¹⁶⁴. Not being legally binding is a major drawback for these agreements, as there is no way to hold states accountable if they do not stick to these agreements¹⁶⁵. Their advantage however, is that soft law can be formed quicker than hard law, as it takes less time to come to an agreement when there is no legally binding mechanism at stake¹⁶⁶. Soft law is therefore being discussed in this chapter as it has major advantages in the face of lacking hard law. Soft law can be a space to form consensus between states on how to address an issue¹⁶⁷. It will not be able to hold states accountable to this consensus if they later deviate, yet it can ensure consistent approaches are developed. If there is interest from states to discuss issues such as how to deal with climate change displacement, soft law can be developed based on what states are politically willing and able to agree on at the time. Consistent approaches to such an issue can then be mainstreamed over time, and potentially form customary law¹⁶⁸. In fact, soft law in general can act as a precursor to international hard law¹⁶⁹. With issues such as climate change displacement which are still rather new, states may not yet be ready to agree to a legally binding framework. However, if an initial consensus is formed between states, this can be trialled and adjusted over time, states who may have initially been hesitant can observe how the soft law is implemented, and in time the political environment may develop for hard law to be formed. Soft law is therefore important for building the foundational shared norms and principles regarding an issue, which then support and strengthen future hard law¹⁷⁰. Furthermore, a major advantage of soft law is that it can involve various non-state actors who are not

¹⁶⁴ Alan Boyle, 'Soft Law in International Law-Making', in *International Law*, ed. Malcolm David Evans, Fourth (Oxford University Press, 2014), p. 411.

¹⁶⁵ Elizabeth Ferris and Jonas Bergmann, 'Soft Law, Migration and Climate Change Governance', *Journal of Human Rights and the Environment* 8, no. 1 (1 March 2017): p. 7.

¹⁶⁶ Boyle, 'Soft Law in International Law-Making' (2014), p. 411.

¹⁶⁷ Ibid.

¹⁶⁸ Ferris and Bergmann, 'Soft Law, Migration and Climate Change Governance', (2017), p. 12.

¹⁶⁹ Boyle, 'Soft Law in International Law-Making', (2014), p. 411.

¹⁷⁰ Ibid.

legally qualified to form hard international law. Non-state actors such as international organisations may have significant influence and expertise that can inform state practice and therefore be very useful in soft law negotiations¹⁷¹. The benefit of this involvement is demonstrated in the pieces of soft law and international cooperation mentioned in this chapter. Specifically in the case of climate change displacement, it is argued that while there is pressure for hard law to broaden its scope to include climate change displacement, it is not equipped to deal with it which is where soft law is advantageous¹⁷². Here, a multi-track approach is suggested where various developing soft law agreements influence the development of, and complement, international hard law¹⁷³. These key pieces of international soft law and cooperation are discussed below.

3.3 Cancun Adaptation Framework

The Cancun Adaptation Framework¹⁷⁴, while now being over 10 years old, was the first time that the international community, under the UNFCCC, agreed upon a text on how to address climate change displacement¹⁷⁵. While it was not legally binding, it was a significant development in the field as it put the issue of climate change displacement on the global agenda. The Cancun Adaptation Framework, as the name suggests, was not focused only on climate change displacement, but was created to enhance action on adaptation to climate change in general. It was therefore also one of the first times that - more broadly - the international community acknowledged that something must be done to address the inevitable damage that will occur to the planet and people, regardless of whatever future advancements are made to reverse the effects of climate change. The Cancun Adaptation Framework was negotiated by the parties to the UNFCCC with the intention of coming to agreement on how states can best support adaptation to climate change¹⁷⁶. The agreement stated that measures should be taken ‘to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels’¹⁷⁷. This was the text

¹⁷¹ Ferris and Bergmann, ‘Soft Law, Migration and Climate Change Governance’, (2017), p. 12.

¹⁷² Ibid. 7

¹⁷³ Ibid.

¹⁷⁴ UNFCCC. Conference of the Parties (COP), ‘Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010’.

¹⁷⁵ Koko Warner, ‘Human Migration and Displacement in the Context of Adaptation to Climate Change: The Cancun Adaptation Framework and Potential for Future Action’, *Environment and Planning C: Government and Policy* 30, no. 6 (1 December 2012): p. 1061.

¹⁷⁶ UNFCCC. Conference of the Parties (COP), ‘Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010’.

¹⁷⁷ Ibid.

agreed upon by all parties to the COP, bar one¹⁷⁸, and is interesting for its choice of wording. The mention of migration and planned relocation as well as displacement suggests a distinction between voluntary and forced movement. On the one hand, this is a key development as it broadens the scope for people to be recognised as needing protection despite moving before their lives were seriously threatened and being displaced. This is important because migration and planned relocation as understood in the context of climate change are not covered by refugee law or human rights law. As has been described in Chapter two, refugee law in order to apply and provide protection, requires individual persecution by an identifiable agent; and human rights law, in so far as it has been interpreted, requires a person to prove their right to life would be under imminent threat for them to be granted protection. From this perspective, the fact that the Cancun Adaptation Framework already supports those who are *likely* to be adversely affected by climate change, and not just those whose lives are already seriously threatened, is an important step towards understanding climate change displacement through a less restrictive lens. On the other hand, delineation between these three types of mobility may support the idea that some types of movement such as relocation and migration are voluntary and therefore less in need of protection. This thesis argues that all types of movement due to negative impacts of climate change should be considered as displacement, and treated with the same level of urgency. However, the Cancun Adaptation Framework does not specify a hierarchy in urgency for providing protection to these three types of mobility hence the human rights-based approach can still be upheld. In line with this, the framework also specifies that cooperation should address the impact of slow-onset weather events. The fact that the Cancun Adaptation Framework already highlighted the need to address both slow onset and sudden onset climate change 10 years ago was a crucial agenda setting moment for future agreements¹⁷⁹. The framework also explicitly states action should be taken at the national and regional level, and not just at the international level. This would fit well with the suggestions offered by in the previous chapter to develop regional cooperation under the guidance of an international framework, as opposed to relying only on a UN-level legally binding agreement¹⁸⁰. The framework goes on to request that ‘developed country Parties [should] provide developing country Parties, taking into account the needs of those that are particularly vulnerable, with long-term, scaled-up, predictable, new and additional finance, technology and capacity-building’¹⁸¹. This is an explicit reference to the ‘common but differentiated responsibilities’ principle in the UNFCCC. If climate change displacement governance is going to be addressed from a human rights perspective it cannot ignore the structural inequalities that cause less developed countries to

¹⁷⁸ Jin Liu, ‘The Cancun Agreements’, *ENVIRONMENTAL LAW REVIEW* 13 (2011), p. 43.

¹⁷⁹ Warner, ‘Human Migration and Displacement in the Context of Adaptation to Climate Change’, (2012), p. 1073.

¹⁸⁰ Angela Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, *Law & Policy* 30, no. 4 (26 September 2008), p. 502.

¹⁸¹ UNFCCC. Conference of the Parties (COP), (2010), p. 5.

be the most vulnerable to climate change. The fact that the Cancun Adaptation Framework has stated in writing that such vulnerability should be addressed means that parties to the framework have at least in theory agreed on this perspective, and there is potential for it to be included in binding agreements later on. Another key reason why the Cancun Adaptation Framework is important is because it framed the way climate change displacement was discussed within the UNFCCC for the next five years leading up to the Paris Agreement¹⁸². This was a period of cooperation in the field as had never happened before and was led by the UNFCCC, before other international institutions picked up the issue¹⁸³. The Cancun Adaptation Framework is therefore significant because of the momentum it created for this issue to be addressed internationally and defined the UNFCCC as a viable place for climate change displacement to be discussed. While the nature of this soft law instrument was therefore very promising, and perceived as a stepping stone to a binding agreement¹⁸⁴, it must be mentioned that putting climate change displacement under the umbrella of an ‘adaptation’ framework can also be harmful as was discussed in Chapter two¹⁸⁵. Another downside of climate change displacement being discussed in the institutional setting of the UNFCCC, is that agreements and policies made here are state-to-state in nature. This was also explained in Chapter two as being a potential drawback. That being said, the Cancun Adaptation Framework’s contribution to the advancement of climate change displacement governance should not be underestimated. It led to the creation of the Warsaw International Mechanism on Loss and Damage¹⁸⁶, which in turn established the UNFCCC Task Force on Displacement¹⁸⁷ which will be discussed next.

3.4 UNFCCC Task Force on Displacement

The UNFCCC Task Force on Displacement (hereafter: Task Force) is another UNFCCC initiative which addresses climate change displacement in the absence of hard international law. The Task Force was mandated by the Executive Committee of the Warsaw International Mechanism for Low and Damage (WIM Excom) at the COP21 in 2015¹⁸⁸. The Task Force offers recommendations to ‘integrate approaches

¹⁸² Sarah L. Nash, ‘From Cancun to Paris: An Era of Policy Making on Climate Change and Migration’, *Global Policy* 9, no. 1 (February 2018), p. 54.

¹⁸³ Ibid.

¹⁸⁴ Liu, ‘The Cancun Agreements’, (2011), p. 43.

¹⁸⁵ See above Chapter 2.3 (International Climate Change Law)

¹⁸⁶ UNFCCC. Conference of the Parties (COP), ‘Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM) | UNFCCC’, November 2013, <https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage/warsaw-international-mechanism>.

¹⁸⁷ ‘Task Force on Displacement | UNFCCC’, accessed 12 May 2023, <https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD#Establishment-of-the-Task-Force-on-Displacement->.

¹⁸⁸ ‘Task Force on Displacement | UNFCCC’ (2023).

to avert, minimise and address displacement related to the adverse impact of climate change'¹⁸⁹. The Task Force involves many expert groups from different backgrounds, including Civil Society, Least Developed Countries, the Warsaw Mechanism for Loss and Damage, the IOM and more¹⁹⁰. They all contribute to the work of the Task Force which first focused on developing recommendations regarding climate change displacement, and is now releasing action plans which work on enhancing cooperation and facilitating the uptake of recommendations¹⁹¹. This Task Force has many advantages to it in the light of inadequate hard law protection. Firstly, it is specifically designed to address climate change displacement, rather than falling under a broader umbrella of climate change issues. Secondly, it involves many non-state actors which is an advantage for centering the human rights perspective. When non-state actors such as civil society are involved, they have the opportunity to highlight the ongoing threat of climate change to people in vulnerable areas, who might otherwise not have their voice heard at international negotiations. The importance of having input from people at the frontlines of climate change displacement cannot be understated. Given that the field of international governance on climate change displacement is still developing, it is very important that top level decision makers understand how climate change truly affects people who are forced to move. At the same time, this Task Force has the benefit of being driven by the UNFCCC, a UN institution. This means that if an international legally binding agreement is to be successful, the UN, or more specifically the UNFCCC is further establishing itself as a relevant forum to do that. The state parties to the UNFCCC will be able to draw on the direct experience of the Task Force - which they agreed to the establishment of, and draw on the forum established there to begin drafting a hard law agreement on the issue.

There has been critique of the Task Force from Ian Fry who was closely involved with the development of the Task Force. He said that the development of the Task Force was originally driven by the Least Developed Countries and Small Island Developing States groups¹⁹². However, according to Fry, due to opposition from Europe and US, the work and aims of the Task Force was buried in the negotiations at COP21¹⁹³. As a result he does not believe the Task Force is going very far or has much chance of creating hard law¹⁹⁴. It is also currently under the coordination of the IOM which has its drawbacks. Fry suggests that because the IOM - as a UN organisation, approaches climate change displacement as a form of

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Fry, Interview with the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change (2023).

¹⁹³ Ibid.

¹⁹⁴ Ibid.

adaptation, it limits the Task Force's ability to apply the human rights-based approach. There is less room now for the issue of displacement to be addressed from a justice perspective as was the original plan. While these are certainly drawbacks to the Task Force, the involvement of non-state actors provides important input opportunities for influencing how states address this issue in international law in future.

3.5 Global Compacts

In the aftermath of the so-called 'refugee crisis' that happened in Europe in 2015/16 the New York Declaration for Refugees and Migrants was adopted by the UN General Assembly¹⁹⁵. The New York Declaration came at a time of unprecedented global displacement¹⁹⁶. Millions of refugees, asylum seekers and internally displaced persons (IDPs) were seeking safety and a better life for themselves and their families. This period was also marked by growing xenophobia in the global north, and a strong anti-immigration sentiment, leading governments to tighten migration routes¹⁹⁷. The New York Declaration therefore stresses the importance of sharing the responsibility for protecting refugees and migrants between countries, international organisations, and civil society¹⁹⁸. Following the adoption of the New York Declaration, the UN General Assembly held a series of consultations and negotiations to develop a Global Compact on Refugees and a Global Compact for Safe, Orderly and Regular Migration (Global Compact on Migration). The Global Compact on Refugees was adopted in December 2018 and provides a more predictable and equitable approach to sharing the burden and responsibility of hosting and supporting refugees globally¹⁹⁹. The Global Compact on Migration was also adopted in December 2018 and aims to improve the management of international migration and promotes the rights of migrants²⁰⁰. The Global Compacts are discussed in this section in order to identify whether, and if so how, they engage with the topic of climate change displacement and analyse the added value they might offer. The Global Compacts differ not only in the people they aim to support, but also in the international law that

¹⁹⁵ Office of the High Commissioner for Human Rights (OHCHR), 'The New York Declaration for Refugees and Migrants', United Nations, accessed 24 April 2023, <https://www.ohchr.org/en/migration/new-york-declaration-refugees-and-migrants>.

¹⁹⁶ United Nations General Assembly, 'A/RES/71/1: New York Declaration for Refugees and Migrants', October 2016.

¹⁹⁷ Simon Tisdall, 'Rise of Xenophobia Is Fanning Immigration Flames in EU and US', *The Guardian*, 22 June 2018, sec. World news, <https://www.theguardian.com/world/2018/jun/22/as-immigration-crisis-explodes-xenophobes-gain-ground-in-eu>.

¹⁹⁸ United Nations General Assembly, 'A/RES/71/1: New York Declaration for Refugees and Migrants'.

¹⁹⁹ United Nations General Assembly, 'Global Compact on Refugees' (2018), <https://www.unhcr.org/sites/default/files/legacy-pdf/5c658aed4.pdf>.

²⁰⁰ United Nations General Assembly, '73/195. Global Compact for Safe, Orderly and Regular Migration' (2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement>.

underpins them. The Global Compact on Refugees aims to support the implementation of refugee law, while the Compact on Migration connects to Human Rights and Migration law²⁰¹.

The Compact on Refugees does mention that ‘in certain situations, external forced displacement may result from sudden-onset natural disasters and environmental degradation’²⁰². This is rather weak wording, however, and specifically only mentions sudden onset events from natural disasters. The link is therefore not made between climate change and displacement. While this is not surprising given how restrictive refugee law is, it has confirmed even in soft law that no new entry point is being created. By comparison, the Global Compact on Migration understands natural disasters, the adverse effects of climate change, and environmental degradation as main drivers for migration and dedicates an entire subparagraph to them²⁰³. The subparagraph is titled ‘Natural disasters, the adverse effects of climate change, and environmental degradation’ under the paragraph: ‘Objective 2: Minimise the adverse drivers and structural factors that compel people to leave their country of origin’²⁰⁴. The subparagraph discusses several points of action for states to take. First it mentions strengthening sharing of information to better predict and address migration movements related to both sudden and importantly - slow onset - natural disasters, and the adverse effects of climate change, all while ensuring the fulfilment of the human rights of all migrants²⁰⁵. Second, it mentions developing adaptation strategies to sudden and slow onset disasters and specifies events such as desertification and sea level rise as causes for migration²⁰⁶. Further points in the Global Compact on Migration specify coordinating and planning in countries of origin and neighbouring countries in order to support climate migrants and ensure their rights are upheld in situations of migration²⁰⁷. This is a definite improvement to making the link between climate change and migration, especially when it has considered not only sudden onset climate change but also slow onset. The Global Compact on Migration has clearly stated that the drivers of migration such as climate change need to be minimised, which is a departure from the adaptation narrative whereby movement of people is seen as a solution. The compact also recognises that climate change is a cause for cross border migration and that these people should be protected and receive help from host states. With the Global Compact on Migration addressing the issue of climate change migration, it is a step forward in soft law towards ensuring human rights protection. However, this thesis does argue that the human rights-based perspective should consider the issue as climate change *displacement*. While migration is often seen as

²⁰¹ Tim Höflinger, ‘Non-Binding and Therefore Irrelevant? The Global Compact for Migration’, *International Journal* 75, no. 4 (1 December 2020): p. 664.

²⁰² United Nations General Assembly, 73/195. Global Compact for Safe, Orderly and Regular Migration (2019).

²⁰³ *Ibid.*, para 12.

²⁰⁴ *Ibid.*, para. 18.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

being voluntary as it happens before life is seriously threatened, if the driver is climate change it is still an unnatural cause for movement and needs to be addressed as displacement. Furthermore, the Global Compact on Migration makes several references to upholding human rights law in the face of migration, yet it does not emphasise the principle of non-refoulement²⁰⁸. As discussed in the international law chapter, the principle of non-refoulement in human rights law could offer a way for climate change displaces to be afforded protection from return to their country of origin²⁰⁹. This possibility was not strengthened in the Global Compact on Migration. Some argue that not making a reference to this in the compact may weaken the pre-existing standard of non-refoulement²¹⁰. Overall the Global Compact on Migration has done well to acknowledge the connection between climate change and human movement, and emphasise that mitigation methods should be prioritised. It has also rightfully acknowledged that it is not only sudden onset climate change that drives migration, but also slow onset which should be equally addressed. However, it is a piece of soft law that has clear room for improvement should it influence hard international law. The placing of climate change mobility under ‘migration’ issues weakens the human rights-based perspective calling for an urgent response to displacement. As migration has international connotations with being something voluntary, it does not underscore the urgency of the situation.

3.6 From the Nansen Initiative to the Platform on Disaster Displacement

The Nansen Initiative is an important piece of soft law as it was the first initiative to address climate change induced displacement from a state-led perspective, rather than a UN led perspective²¹¹. When the Cancun Agreements stated that climate change mobility requires increased cooperation and coordination on the issue, Norway and Switzerland took the opportunity to lead a state-led negotiation on the matter. Notably, this came after the UNHCR tried to lead on such an initiative, but were unsuccessful, as there was clear hesitation to discuss the matter under an international institution²¹². The Nansen Initiative was therefore initiated by Norway and Switzerland in an effort to bypass institutional constraints for reasons of ‘sovereignty, competing priorities or the lead role of the UNHCR in the process’²¹³. This state-led

²⁰⁸ Höflinger, ‘Non-Binding and Therefore Irrelevant?’, (2020), p. 665.

²⁰⁹ Human Rights Committee, ‘Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016’ (International Covenant on Civil and Political Rights, October 2019).

²¹⁰ Höflinger, ‘Non-Binding and Therefore Irrelevant?’, (2020), p. 665.

²¹¹ The Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change: October 2015’, March 2016.

²¹² Jane McAdam, ‘Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013’, *Refuge: Canada’s Journal on Refugees* 29, no. 2 (26 February 2014): p. 15.

²¹³ Elizabeth Ferris and Jonas Bergmann, ‘Soft Law, Migration and Climate Change Governance’, *Journal of Human Rights and the Environment* 8, no. 1 (1 March 2017): p. 18.

initiative resulted in an ‘Agenda for Protection of Cross-Border Displacement in the Context of Disasters and Climate Change’ (Agenda for Protection) which was endorsed by 109 States²¹⁴. This is an impressive number considering the political hesitancy around the issue. The Nansen Initiative and subsequent Agenda for Protection highlight the importance of soft law in the absence of legal obligations, as they focus on the integration of existing effective practices in the normative framework of states and sub-regional organisations²¹⁵. As was mentioned when discussing the advantages of soft law, the Agenda for Protection was able to avoid the sensitivities around institutional mandates, and could include NGOs, the scientific community and international organisations in a relatively neutral space²¹⁶. As a result, the Agenda for Protection - which has recently been superseded by the Platform on Disaster Displacement, recognises that the issue of disaster displacement is one of the biggest humanitarian challenges of the 21st Century²¹⁷. The work started by the Nansen Initiative has provided an important step towards providing international consensus, as it was formed through a series of consultations with actors who are involved ‘on the ground’ and thereby follows a bottom-up approach in order for states to have a better understanding of how this displacement needs to be addressed²¹⁸. It also emphasises the need for different solutions in different regions in light of each region’s specific contexts²¹⁹. This is a major advantage of such an initiative, it does not have to be a standard setting legal instrument where the same law applies equally to all states. Where there are different levels of need, and different solutions available, international cooperation can, like regional agreements, adapt to this, which is far more likely to get buy-in from states. Of course, this can be criticised as there is no guarantee that states will do what they have agreed on, yet if states are willing to endorse something without the same amount of political pressure that surrounds hard law, it would suggest a strong willingness to cooperate on the issue. Even if the soft law may seem too ‘soft’ to be meaningful beyond public support from states, the solutions initiated through the Nansen Initiative are very tangible and actionable. Among the suggested solutions are offering ‘humanitarian visas, stays of deportation, granting refugee status in exceptional cases, bilateral or regional arrangements on free movement of persons, expediting normal migratory channels, or the issuance of work permits’ to people displaced by disasters²²⁰. Where international legal mechanisms are lacking and there is disagreement as to which international institution this issue should be housed under,

²¹⁴ Judith Kumin and Frances Nicholson, ‘A Guide to International Refugee Protection and Building State Asylum Systems’, Handbook for Parliamentarians N° 27 (UN High Commissioner for Refugees (UNHCR), 2017), p. 150.

²¹⁵ Ibid.

²¹⁶ McAdam, ‘Creating New Norms on Climate Change, Natural Disasters and Displacement’, (2014), p. 15.

²¹⁷ Atapattu, ‘Climate Change and Displacement’, (2020), p. 99.

²¹⁸ Ferris and Bergmann, ‘Soft Law, Migration and Climate Change Governance’, (2017), p. 19.

²¹⁹ McAdam, ‘Creating New Norms on Climate Change, Natural Disasters and Displacement’, (2014), p. 15.

²²⁰ The Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (2016), p. 26.

having such practical solutions available that are based on the situation on the ground is a big advantage. It highlights the importance of having state-led cooperation where international institutions are delaying, or too politically charged to adequately address the issue.

An important issue that needs to be addressed with this series of international cooperation is that it specifically addresses ‘disaster displacement’. The term disaster displacement, rather than climate change displacement could be seen as avoiding the issue of climate change. Climate change issues are well-known to cause tension at international negotiations, it is by no-means a clear cut issue and consensus is ultimately lacking on how to address it. The Nansen Initiative has taken this into account, and removed the reference to climate change induced disaster in its work. This way, the term itself is not mentioned, but this can give the advantage of not having to establish the causality between climate change and a certain disaster, which as explained in the introduction, can be difficult. Furthermore, it broadens the scope of the Initiative’s work to cover all disasters, not just those that are linked to climate changes, for example volcanoes or earthquakes. In the Nansen Initiative, a disaster is defined as ‘A serious disruption of the functioning of a community (...) involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources’²²¹. Here, the Nansen Initiative does well to define a disaster not as an event itself, but rather as the consequence of an event, whereby communities or societal groups are no longer able to cope with the event. Instead of trying to define exactly what type of event constitutes a disaster, which would inevitably exclude some events while including others, this definition makes it clear that protection needs to be offered to all that have suffered severe human, material, economic or environmental losses. From the human rights-based perspective, this is vast improvement as it takes the burden off the affected community to prove that they are facing persecution, as is required in refugee law. The definition is therefore strong in that it defines when communities are no longer able to cope with the impact of the disaster, and not what the disaster itself is. The fact that this definition garnered wide international support is an important improvement in the face of inadequate hard law. There is still concern among some that the lack of a direct mention of climate change displacement ignores the direct link between man-made climate change and displacement²²². However, with demonstrated willingness to address the definition of disaster in such a broad way there is potential for climate change induced displacement to be addressed properly in the future.

²²¹ The Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change: October 2015’, (2016), p. 16.

²²² Fry, Interview with the Special Rapporteur on the promotion and protection of human rights in the context of climate change on the current status of Climate Change Displacement in International Law (2023).

3.7 Conclusion

This chapter has demonstrated that soft law has great potential to build momentum towards addressing the issues of climate change displacement. The advantages of soft law as outlined in the beginning have been demonstrated in the several pieces discussed in this chapter. Significantly, it has demonstrated that soft law can incorporate non-state actors in a meaningful way. If non-state actors are given the opportunity to sit at the negotiating table they can add valuable expertise from scientific or humanitarian perspectives, or even as people experiencing displacement threat themselves. In turn, this input has the potential to influence developing hard law in a positive way so that perspectives beyond that of state interest may be included. Furthermore, the chapter has shown that this issue has already been discussed in soft law agreements as early as 2010. This means that over 10 years of international negotiations have taken place regarding the issue which now has a guaranteed place on the international agenda. It is also clear that over this period, climate change displacement and possibilities for protection have been approached from several different perspectives. The environmental law perspective under the UNFCCC, the migration and human rights law perspective under the UN General Assembly, and the state initiatives with input from non-state actors all contribute to the development of norm creation addressing climate change displacement. The chapter also demonstrates room for improvement in the area of soft law for it to make a meaningful impact on providing protection and ensuring rights are upheld. A key issue remains deciding on a definition of the issue and how to address it. As mentioned, the adaptation approach often used by the UNFCCC risks seeing climate change displacement as a solution rather than a last resort. Addressing the issue under the umbrella of migration risks undermining the urgency and forced nature of the issue. And failing to acknowledge the direct link between man-made climate change and displacement risks understanding the issue as a natural occurrence rather than a climate justice issue. All of these definitional discrepancies need to be worked out before hard law can be created. At the same time, the question of which UN institution would host such a law and administer it needs to be agreed on also. The benefit here is that soft law can offer flexibility to keep improving the work on these issues while momentum is built for potential hard law.

4. Regional approach to climate change displacement

4.1 Introduction

Having discussed international hard and soft law in the previous two chapters, this chapter will now turn to the regional level. Regional approaches to climate change displacement are important to consider as they can account for regional specificities in a way that international solutions can not. Regional agreements may also be created faster as there are less parties involved. Furthermore, where regional agreements have already formed they can act in a complementary manner to the international level, strengthening global agreements by applying them to the specific characteristics of the region. While no region of the world is immune to climate change displacement, and many countries are addressing the issue in different ways, this chapter will only focus on governance in New Zealand and Pacific Islands. Ideally, each region of the world would be analysed in this thesis however due to time and space limitations that is not possible. The Pacific region has been chosen because of the international attention it has received for being one of the most visible cases of climate change already affecting livelihoods and driving displacement²²³. A prominent example of this is the first ‘climate refugee case’ as discussed earlier²²⁴. While New Zealand has so far not actually accepted any climate refugees from the Pacific Islands, it has dealt with their application for protection in New Zealand as a result of climate change. Climate change displacement literature often references the case of the Pacific Islands²²⁵, as they are particularly affected by sea level rise. Sea level rise threatens the entire territory of many Pacific Island states, and not just the coast lines²²⁶. Despite this, there is a strong movement amongst Pasifika people for staying on their land for as long as possible, viewing displacement as a last resort and not something they would voluntarily opt for. This means that ‘voluntary’ migration is unlikely to take place and Pasifika people would like to focus on adaptation to climate changes while remaining on their land for as long as possible.

For a period, the Tuvalan president was campaigning for a ‘migration with dignity’ scheme²²⁷. The idea behind this was to put pressure on developed countries to not accept migrants only when it's ‘too late’, but

²²³ Fry, Interview with the Special Rapporteur on the promotion and protection of human rights in the context of climate change on the current status of Climate Change Displacement in International Law, (2023).

²²⁴ Amnesty International, ‘UN Landmark Case for People Displaced by Climate Change’, (2020).

²²⁵ Mcadam, ‘Swimming against the Tide’, (2011), p 3.

²²⁶ Kiribati, Tuvalu, Vanuatu, the Maldives, Fiji, Solomon Islands, Marshall Islands Nauru, and Samoa are low-lying island states sitting at 1-3 metres above sea level already experiencing land loss due to sea level rise, predicted to increase in the next 50 years.

²²⁷ Shanna McClain and Carl Bruch, ‘Migration with Dignity: A Framework to Manage Climate Change and Prevent Conflict - Peace and Justice Studies Association’, 25 April 2021, <https://www.peacejusticestudies.org/chronicle/migration-with-dignity-a-framework-to-manage-climate-change-and-prevent-conflict/>.

rather offer dignified routes of migration. The Tuvalan president argued that climate migration should not be something that has to happen once a person's entire livelihood is destroyed and they have to start from scratch somewhere else. Because we know and can predict where climate change is likely to cause displacement, it can also provide the opportunity for people to move with dignity and planning to safe areas, even if that is across borders. If Pasifika people are not able to stay on their homelands, then they should at the very least be able to move to a new place with dignity. That being said, there is nuance to this issue, and while some people are in major support of this idea, other Pasifika people are worried that migration will be supported by developed countries as a way to get out of accountability for contributing to climate change and its destruction of island states²²⁸. Therefore, when the New Zealand Green Party did table a humanitarian visa scheme for Pacific Islanders affected by climate change²²⁹, it was discouraged by Pacific Islanders themselves²³⁰. The concern was that by making such a visa, it would distract from the fact that first and foremost, Pacific people want to stay in their homes and want greenhouse gas emissions to be lowered drastically²³¹. With that being said, it is clear that New Zealand has a role in supporting its Pacific Island neighbours, especially as a country that has developed through the use of fossil fuels. New Zealand's work in the region regarding climate change displacement will be discussed in the following sections.

4.2 Regional Bodies: Pacific Islands Forum and the Secretariat of the Pacific Regional Environment Programme

When discussing New Zealand's approach in the Pacific region to climate change displacement, it is important to mention the existing regional governance bodies working in this field. Notably, the Pacific is one of the few regions that does not have a regional human rights convention or court, such as Africa, the Americas and Europe, and therefore lacks a formal body where human rights complaints can be brought against countries in that region. As we have seen with the *Teitiota vs New Zealand* case, once unsuccessful at the national level, the case was brought directly to the Human Rights Committee as no intermediate option was available. With such a legal body missing, there is also a missed opportunity for strengthened cooperation on issues that affect all countries in the Pacific, such as climate change. In light

²²⁸ Lydia Kim, 'New Zealand: A Global Leader on Climate and Displacement?', *Policy Forum*, 25 June 2019, <https://www.policyforum.net/new-zealand-a-global-leader-on-climate-and-displacement/>.

²²⁹ Charles Anderson, 'New Zealand Considers Creating Climate Change Refugee Visas', *The Guardian*, 31 October 2017, sec. World news, <https://www.theguardian.com/world/2017/oct/31/new-zealand-considers-creating-climate-change-refugee-visas>.

²³⁰ *Ibid.*

²³¹ *Ibid.*

of this, Pacific countries have formed several intergovernmental organisations which cooperate, amongst other things, on the issue of climate change in the Pacific. The two most important ones are the Pacific Islands Forum²³² and the Secretariat of the Pacific Regional Environment Programme²³³.

Both of these regional bodies are made up of most Pacific Island states²³⁴, as well as Australia and New Zealand and provide space for regional affairs to be discussed, as well as being a space where regional soft law can develop. A specific outcome of the Pacific Islands Forum was the Niue Declaration²³⁵ which was the first climate change declaration made in the region. While already made back in 2008, this declaration specifically stated that it would like to encourage the ‘Pacific’s Development Partners to increase their technical and financial support for climate change action on adaptation, mitigation and, if necessary, relocation’²³⁶. The ‘Pacific’s Development Partners’ includes New Zealand as it gives a large proportion of its development finance to the Pacific Islands, which also means it is involved in the region's climate change relocation strategies. As mentioned above, many island nations have stated their preference for displacement from their homes to be a last resort as they would like to maintain their cultural ties for as long as possible. However, the Niue Declaration makes it clear that relocation is a possibility and that support is encouraged for that. Moreover, the choice of wording for ‘relocation’ is interesting as it refers to planned movement, which is something that has already occurred in the Pacific islands²³⁷, and allows for entire villages to be resettled in a way that they can remain together as a community. While the reference to displacement is missing, the Niue Declaration is still attempting to mainstream the human rights-based approach as it caters to the need of communities to stay together and maintain cultural links, even if they cannot stay on their land.

The Secretariat of the Pacific Regional Environment Programme specifically deals with environmental issues in the region and is another space where Pacific nations and their partners can discuss the

²³² Pacific Islands Forum Secretariat, ‘Pacific Islands Forum’, *Serving the Pacific: Our Work and Programs* (blog), 18 June 2023, <https://www.forumsec.org/>.

²³³ Secretariat of the Pacific Regional Environment Programme, ‘Home | Pacific Environment’, 18 June 2023, <https://www.sprep.org/>.

²³⁴ Pacific Islands Forum: Cooks Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Kingdom of Tonga, Tuvalu, Vanuatu.

Secretariat of the Pacific Regional Environment Programme: American Samoa, Commonwealth of the Northern Mariana Islands, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, Wallis and Futuna

²³⁵ Pacific Islands Forum Secretariat, ‘THE NIUE DECLARATION ON CLIMATE CHANGE – Forum Sec’, accessed 25 April 2023, <https://www.forumsec.org/2008/02/21/the-niue-declaration-on-climate-change/>.

²³⁶ Ibid.

²³⁷ Fry, Interview with the Special Rapporteur on the promotion and protection of human rights in the context of climate change on the current status of Climate Change Displacement in International Law (2023).

possibility of climate change preparedness²³⁸. The priorities of this programme are to work on Climate Change Resilience, Environmental Governance, Island and Ocean Ecosystems, Waste Management and Pollution Control²³⁹. There is no specific mention of climate change displacement or the delay of it in these priorities, yet this forum still operates as an important space where the region can come together to coordinate the effects of climate change, and could therefore serve as a place to discuss displacement or relocation in the future.

Regional conferences have also led to important developments on the issue of climate change displacement. The Ambo Declaration, adopted in 2010 by 12 countries as part of the Tarawa Climate Change Conference, suggests supporting ‘consideration of development and implementation of strategies and actions directed at protecting people displaced within or across borders as a result of adverse effects arising from climate change extreme events’²⁴⁰. The wording in this declaration is significant, as unlike most international soft law, it explicitly discusses protecting cross border displacement due to climate change. Making the direct connection between displacement and climate change, and using the term displacement rather than migration is clearly in line with the human rights-based approach and would therefore do well to influence international approaches to the issue. New Zealand was amongst the countries that adopted both the Ambo Declaration and the Niue Declaration. While both of these agreements are non-legally binding they signify at least a regional awareness of, if not willingness to act on, the impending issue of climate change displacement. Continued participation in both the Pacific Islands Forum and the Secretariat of the Pacific Regional Environment Programme is also a clear indication of New Zealand’s readiness, as a developed country in the region, to collaborate with Pasifika on regional governance regarding climate change displacement. While New Zealand’s participation in these two fora, show general support for such soft law and aims to support climate action in the region, it does not constitute any specific policy with defined goals. Despite having signed the aforementioned declarations back in 2008 and 2010 respectively, the first true policy commitments to climate change displacement came in 2019. The three key Pacific programmes that the New Zealand government is part of are analysed below.

²³⁸ Pacific Islands Forum Secretariat, ‘Pacific Islands Forum’ (2023).

²³⁹ Ibid.

²⁴⁰ Tarawa Climate Change Conference. ‘The Ambo Declaration’, November 2010. <https://library.sprep.org/sites/default/files/662.pdf>. Accessed 21 June 2023.

4.3 Pacific Climate Change Related Displacement and Migration: A New Zealand Action Plan

According to the New Zealand Government website, the ‘Pacific Climate Change Related Displacement and Migration: A New Zealand Action Plan’ (hereafter: Action Plan) reflects the Government’s ambition for New Zealand to become a global leader on climate change²⁴¹. The Action Plan aims for early, calibrated and transparent action on Pacific climate change related displacement and migration²⁴². The Action Plan contains several key points as to how New Zealand intends to address displacement and in the Pacific. Firstly, New Zealand is putting a big focus on sending development assistance to the Pacific Islands in order to avert and delay displacement²⁴³. This development assistance is primarily coming in the form of climate finance which gives Pacific island states the support they need to manage adaptation efforts on their islands. It recognises that while small island states in the Pacific are still ‘developing’, New Zealand as a ‘developed’ country has the means to support its neighbours in dealing with the effects of climate change. New Zealand’s emphasis on first averting and delaying displacement is significant. This is a strong human rights approach to the issue because it is directly in line with what Pasifika people have voiced as their preference over moving. Rather than move now before it is the last option, Pasifika people have said they would like to stay on their community land for as long as possible²⁴⁴. The Action Plan also highlights the importance of Pacific Island people staying in their countries if displacement must happen²⁴⁵. Even if New Zealand supports cross border displacement, any form of legal protection offered to these people will likely not be as strong as the protection they have in their own countries. It is therefore not just the loss of ancestral lands and community ties that people would suffer from, but a potential loss of statehood and as a result, less legal protection in New Zealand. As the nature of sea level rise is likely to make many of the Pacific Islands uninhabitable in coming years, Pasifika people may lose their entire states to climate change, which opens complex legal questions about citizenship. Therefore, the Action Plan has added an important point that any potential movement should be a well-coordinated process²⁴⁶. If it is to be a last resort option as Pacific people have suggested, this should not mean that it is a chaotic process where people are left to fend for themselves without protection. This Action Plan

²⁴¹ Office of the Minister of Foreign Affairs, ‘Pacific Climate Change-Related Displacement and Migration: A New Zealand Action Plan’ (Ministry of Foreign Affairs and Trade (New Zealand), January 2019), <https://apo.org.au/sites/default/files/resource-files/2018-05/apo-nid213946.pdf>.

²⁴² Ibid., p. 1.

²⁴³ Ibid.

²⁴⁴ Ibid., p. 9.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

therefore appears to follow a strong human rights-based approach by centering people's need to receive clear communication and planning around their future should the worst-case scenario occur. The plan to avert and delay displacement also recognizes the wish made by Pacific states that displacement of their people to other countries is not used as a 'solution' by developing countries whereby they can be relieved of their responsibility to cut their emissions²⁴⁷. This goes against the 'adaptation perspective' which has been discussed earlier and argues that moving is a form of adapting to climate change. It is convenient for the international community to posit displacement as a solution to climate change as it means they do not have to invest in mitigating the effects of climate change in places where that would require drastic action. The Action Plan also recognizes that the Pacific Islands are not one homogeneous group but rather a region of many different cultures and traditions which means that solutions to the negative effects of climate change should also reflect these differences²⁴⁸. Furthermore, the Action Plan aims to support development at the international level by advocating for change through the Pacific Islands Forum and also researching the future impacts of climate change on displacement²⁴⁹. It is hard to find something to critique in this initial Action Plan, which has highlighted the Pacific Island right to sovereignty, the need for solutions to be led and owned at the national level by the countries impacted, and for solutions to cater to the different perspectives of each respective island nation²⁵⁰. This shows a keen awareness of many issues such as the need for Pacific islanders to have leadership and control of what concerns them, and for the international community to act as a support system rather than in a neo-colonial manner whereby self-interest is favoured over Pacific islanders' rights. While this plan seems to be very successful in mainstreaming human rights approaches in its governance of displacement in the South Pacific, it is only a plan. The Action Plan was released at the start of 2019, and at the end of 2019 an update on the progress of the plan was released by the Ministry of Foreign Affairs. While the actual plan was not updated because it has now been subsumed under the New Zealand Climate Change Programme, to be discussed in the following section, a government statement was released on the progress of the aims stated in the Action Plan. In this statement, the Ministry of Foreign Affairs announced that three quarters of the 3000 million New Zealand dollars that are dedicated towards climate change development in the Pacific, will support averting and delaying displacement of people²⁵¹. The rest of the update states that the goals in the

²⁴⁷ Andreas Neef and Lucy Benge, 'Shifting Responsibility and Denying Justice: New Zealand's Contentious Approach to Pacific Climate Mobilities', *Regional Environmental Change* 22, no. 3 (September 2022), p. 94.

²⁴⁸ Office of the Minister of Foreign Affairs, 'Pacific Climate Change-Related Displacement and Migration: A New Zealand Action Plan', (2019), p. 9.

²⁴⁹ *Ibid.*, 12.

²⁵⁰ *Ibid.*, 17.

²⁵¹ Secretary of Foreign Affairs and Trade, 'Progress of the "Pacific Climate Change-Related Displacement and Migration: A New Zealand Action Plan"' (Released under Official Information Act)' (New Zealand Ministry of Foreign Affairs and Trade, July 2019), p. 1, <https://www.mfat.govt.nz/assets/OIA/OIA-release-climate-change-v2.pdf>.

Action Plan are still in the ‘planning stage’, such as undertaking more research and attending regional dialogues on the issue²⁵². The intention was still that everything stated in the Action Plan will take place however there will be no official updated version of the Action Plan as the ‘New Zealand Climate Change Programme’ has replaced it. Overall, this initial plan by the New Zealand Ministry of Foreign Affairs shows a lot of promise for mainstreaming the human rights-based approach in its response to the issue of climate change displacement.

4.4 New Zealand Climate Change Programme

The New Zealand Climate Change Programme (hereafter: the Programme) was initiated in 2019 and is a programme focused on ‘building resilience in the Pacific to the impacts of climate change’²⁵³. The Programme initially had a three-year work plan, which has since been extended for another three years with a major focus on climate finance²⁵⁴. The Programme is operating in 14 countries in the Pacific and has two main aims and seven key goals²⁵⁵. The overarching aims are improving the Pacific’s resilience to climate change and advocating for effective global climate action²⁵⁶. The seven goals include driving greater action to reduce greenhouse emissions and, importantly, addressing climate change related human mobility²⁵⁷. It was confirmed in the Programme that 300 million New Zealand dollars would be delivered between 2019 and 2022, although it seems only two-thirds of that is going to the Pacific while presumably the last third is dedicated to advocating for effective global climate action.

In this first phase of the Programme, emphasis was still on supporting Pacific countries to ‘avert and delay’ climate change related human mobility, with the addition that now New Zealand would also support in ‘preparing’ for this²⁵⁸. This seems to suggest that in the planning of this Programme, the New Zealand government realised that it also needed to actively prepare for the possibility of movement, and not only focus on averting and delaying it. The Programme goes on to specify that the development of local, national and regional responses to pacific climate mobility will be supported, while also investing in research on climate mobility to support informed decision-making and policymaking. There is not much more reference to climate change mobility in the first phase of this project, however in the second phase, the financial strategy details more of New Zealand’s plans. In the second phase, the emphasis has

²⁵² Ibid.

²⁵³ New Zealand Ministry of Foreign Affairs and Trade, ‘The Climate Change Programme’.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

been put on providing climate finance, with a commitment of 1.3 billion New Zealand dollars available for 2022-2025²⁵⁹. 50 percent of that is dedicated to going towards the Pacific Islands specifically while the rest is dedicated to adaptation more generally in New Zealand and beyond²⁶⁰. In this second phase, New Zealand clarifies once again that it acknowledges Pacific peoples wanting to continue living in their own countries for as long as possible. However, it goes on to state that the need for communities to relocate or migrate from their land is a legitimate response to climate change²⁶¹. Therefore, New Zealand is committed to working with local tribes, Pasifika communities, and domestic agencies in order to understand what challenges and opportunities are associated with climate mobility²⁶². The strategy also states that research will be invested in, and regional and international processes regarding possible legal processes regarding displacement will be supported by New Zealand in order to understand the implications for the country²⁶³. In other parts of the strategy, New Zealand's role in supporting Pacific nations dealing with displacement, internal relocation and cross-border migration was further emphasised and the link between conflict over scarcity of resources and displacement was also made. Overall, this strategy therefore appears to have considered climate change displacement with the best interests of Pasifika communities in mind. The amount of money being made available to support the Pacific has increased significantly, while a respect for Pasifika people who want to stay on their land for as long as possible is respected. At the same time, the Programme in both its first and second phases is acutely aware of the possibility of displacement as a result of climate change in the Pacific Islands and that New Zealand has a role in supporting the Pacific to deal with this. This is a clear example of the human rights approach being mainstreamed by a 'developed' country. New Zealand has made it very clear that it is going to work alongside Pasifika communities to deal with the effects of climate change in the best way possible, and respect the needs and wishes of the local community. It is also using its leverage as a developed country to advocate for progress on the issue of climate mobility at the global level, and is investing in research so the issue can be dealt with in an informed manner. While the continued reference to relocation and migration and not only displacement may appear to undermine the seriousness of the situation, it is important that all three terms were used interchangeably with the same goals to support.

²⁵⁹ New Zealand Ministry of Foreign Affairs and Trade, 'Aotearoa New Zealand International Climate Finance Strategy' (New Zealand Government, August 2022), <https://www.mfat.govt.nz/assets/Aid/Climate-finance/International-Climate-Finance-Strategy-FINAL-16Aug22-low-res.pdf>.

²⁶⁰ Ibid., p. 3.

²⁶¹ Ibid., p 12.

²⁶² Ibid.

²⁶³ Ibid.

4.5 Pacific Climate Change Migration and Human Security Programme

While the previous two sections have discussed regional governance that has been led by New Zealand and focused on the Pacific, the Pacific Climate Change Migration and Human Security Programme (hereafter: PCCMHS) is led by a group of organisations and states²⁶⁴. The lead agency coordinating this Programme is the International Organisation on Migration (IOM), however the OHCHR, ILO, Platform on Disaster Displacement and the Pacific Island Forum Secretariat are also partners working on the PCCMHS. In this sense, the programme is addressing the issue of climate change migration governance from various perspectives, including from the international UN level, and from the regional level where the affected states are represented through the Pacific Islands Forum. The programme is therefore a good example of how international organisations can work together with states to find solutions at the regional level where no solutions exist internationally. While the funding for this programme comes from the UN Trust Fund for Human Security and the New Zealand Aid Programme, its governance structure is composed of many different stakeholders which is important for addressing such a global issue even at the regional level. The international organisations are able to lend their expertise and resources to the work, while the Pacific state leaders are able to provide the local context and make sure that the needs of Pasifika communities are met. The PCCMHS was initially given a three year work plan from 2019-2022 but has entered its second phase this year with a one year extension²⁶⁵. The aim of the programme is to ‘protect and empower communities adversely affected by climate change and disasters in the Pacific region, focusing specifically on climate change and disaster-related migration, displacement, and planned relocation’²⁶⁶. This programme clearly approaches the possibility of migration a little bit differently to the New Zealand government plans, which very clearly aimed to first avert and delay climate migration. Instead, PCCMHS is focused specifically on addressing migration, displacement and relocation in the Pacific. This is not necessarily a bad thing, as it is clear that support is already being given from New Zealand to avert, and so this programme focusing on the possibility of displacement would ideally mean that if displacement occurs, Pasifika people have strong support beyond just the New Zealand government. The PCCMHS has three main objectives as part of its work plan. These are 1) Contribute to

²⁶⁴ International Organisation for Migration, ‘[PCCMHS] Enhancing Protection and Empowerment of Migrants and Communities Affected by Climate Change and Disasters in the Pacific Region | Environmental Migration Portal’, 2019, <https://environmentalmigration.iom.int/pccmhs-enhancing-protection-and-empowerment-migrants-and-communities-affected-climate-change-and-disasters-pacific-region>.

²⁶⁵ United Nations Department of Economic and Social Affairs, ‘Pacific Climate Change Migration and Human Security Programme (Phase II)’, 2023, <https://sdgs.un.org/partnerships/pacific-climate-change-migration-and-human-security-programme-phase-ii>.

²⁶⁶ International Organisation for Migration, ‘[PCCMHS] Enhancing Protection and Empowerment of Migrants and Communities Affected by Climate Change and Disasters in the Pacific Region | Environmental Migration Portal’ (2019).

the evidence-based good practices in responding to climate change and disaster-related migration, displacement, and planned relocation with particular focus on the role of the human security framework; 2) pacific communities and governments demonstrate strengthened capacity and coordination through a human security-based response to climate change and disaster-related migration, displacement, and planned relocation; 3) migrants and communities in the Pacific Island Countries benefit from safe labour migration as a sustainable development and climate change adaptation strategy²⁶⁷. A few aspects of these objectives are important to analyse. First is the fact that once again Pacific communities are put at front and centre of this programme in terms of prioritising their needs and making sure they have the capacity to deal with the effects of climate change. Rather than only aiming to support government leaders and officials, the PCCMHS has expressly stated its intention to support communities too which suggests a strong human rights approach of working with the most affected people. Secondly, the focus on safe labour migration for Pacific communities is another interesting aspect. It has often been suggested that a ‘solution’ to displacement in the Pacific has already been provided by New Zealand and Australia’s working visas, New Zealand’s visa being called the ‘Pacific Access Category’ (PAC). Despite some views that these visa schemes offer a form of safe and legal migration from the Pacific Islands to developed countries like New Zealand, this is not the case in reality²⁶⁸. As the PCCMHS’s own reports note, the PAC is extremely exclusionary, only offering a quota of visas to Pacific Islanders who are mostly required to be young, able-bodied men with high English proficiency and an existing job offer in New Zealand. Obviously, such a visa scheme excludes many people from being able to move and is based on how much value migrants offer to New Zealand rather than providing safety to those displaced by the effects of climate change. It would therefore not appear to be something that the PCCMHS would want to support as it is not viable or just a solution to the issue. However PCCMHS discusses at length how this type of visa scheme could be improved and offer a channel for migration where there are currently very limited options²⁶⁹. Finally, the emphasis of the PCCMHS to employ the human security framework is significant as it is closely tied to the human rights-based approach. The human security framework prioritises the security of the human over the security of the state, and measures security by assessing whether the survival, livelihood, and dignity of the individual is possible, rather than just assessing the threats of a conflict in general. This supports the human rights-based approach, where the individual right holder and their needs are met rather than only the needs of the state. Another key aspect of the PCCMHS is its establishment of a Joint Working Group on Climate Mobility which aims to develop a draft regional

²⁶⁷ Ibid.

²⁶⁸ Williams, ‘Turning the Tide’, (2008), p. 515.

²⁶⁹ International Organisation for Migration, ‘[PCCMHS] Enhancing Protection and Empowerment of Migrants and Communities Affected by Climate Change and Disasters in the Pacific Region | Environmental Migration Portal’ (2019).

framework on climate mobility which will address the gap in protection of the movement of people in the context of climate change²⁷⁰. This is significant as it is a clear commitment to find potential legal solutions, even if they are initially soft law, to the case of climate change displacement. The major legal gap that exists for climate change displacees at the international level could therefore be filled by such a regional framework as suggested in the PCCMHS. While this is an important advancement, it is not the only aim of the PCCMHS and as the second phase report reiterated: the PCCMHS ‘everyone who moves in the context of climate change is able to enjoy their human rights, regardless of status’²⁷¹. The PCCMHS’s approach, which was expressly supported by the New Zealand government in 2022²⁷², is clearly centering the human rights approach in the sense that it is preparing for the possibility of migration and displacement while putting emphasis on this being a last resort option which should at all times protect the rights holders. Regarding definitional issues, the Programme does include the word migration in its title, rather than displacement, which may be due to the IOM leading the coordination of the Programme. However, its reports make it clear that displacement is equally high on the agenda and that any form of movement should ensure human rights are upheld.

4.6 Relevance for the development of international law

It is clear that at least on paper, New Zealand and the Pacific have a strong human rights-based approach when it comes to climate change displacement governance. New Zealand has shown that it is possible to offer support to vulnerable communities without having to adopt a one size fits all approach but to support communities with their preferred solutions to the issue. This is something that has huge potential to complement climate change displacement governance at the international level. As discussed in the chapter on the possibility of a new international framework, it may be possible for a framework or convention to not specify one approach that must be taken in order to deal with displacement, and rather give space for the affected regions and communities to centre their own approaches. This is easier said than done of course, and it is notable that New Zealand itself has not yet changed any of its immigration laws to offer protection for climate change displacees, although there is openness to do so. While at the international level a legal agreement is going to take some time, the international community can still

²⁷⁰ Ibid.

²⁷¹ United Nations Department of Economic and Social Affairs, ‘Pacific Climate Change Migration and Human Security Programme (Phase II)’ (2023).

²⁷² New Zealand Ministry of Foreign Affairs and Trade, ‘High-Level Briefing on Climate Change, Human Mobility and Human Security: Statement of Support for the Pacific Climate Change Migration and Human Security Programme’, New Zealand Ministry of Foreign Affairs and Trade, 30 November 2022, <https://www.mfat.govt.nz/en/media-and-resources/high-level-briefing-on-climate-change-human-mobility-and-human-security-statement-of-support-for-the-pacific-climate-change-migration-and-human-security-programme/>.

learn from the Pacific region approach in offering immediate solutions through climate finance. While many communities that are vulnerable to climate change may be predicted to move, there is still time, in many cases, for them to be supported through climate finance to adapt to the negative effects of climate change. Offering climate finance is a global solution, but can also vary according to need and availability of support in different regions. It has the possibility to empower local communities to make their own decisions based on their knowledge of the land and how their way of life can be best protected. Furthermore, supplying climate finance can be a way to emphasise the common but differentiated responsibilities approach where developed countries support those less developed. This means that the international community can already support safe and dignified movement without needing an international agreement regarding cross border climate change displacement. This appears to be the approach that New Zealand is taking for now, which is in line with the human rights approach as it means that communities remain in their country of origin where, even if they lose their land, they will be likely to remain in a place where they speak the language, share the same culture and have citizenship. At the same time, the international community can follow New Zealand's example and plan for a governance framework without using displacement as a way to relieve pressure from finding solutions to the effects of climate change.

4.7 Conclusion

This chapter has shown that the regional level can indeed offer a lot of potential learnings and/or complement the international level. In a region such as the Pacific, where no hard regional law exists to govern cross border climate change displacement, it is clear that alternative solutions are possible. There may still be too much hesitation from developed countries such as New Zealand to support a regional legal framework yet they are clearly very open to exploring the option in the future. In the meantime they have made a clear commitment to supporting the Pacific, specifically to address the possibility of climate change displacement. By sending climate finance to the Pacific rather than sending development aid workers to try and fix the problems themselves, climate finance can bring power to the affected communities if it is distributed in a just way to those whose futures are most at stake. This is absolutely something that can be implemented at the international level. While it is unlikely that states will sign a binding agreement regarding a certain amount of money they are required to dedicate towards averting and delaying climate change displacement, they can at least be encouraged to do so if they see how successful it has been in the Pacific. Furthermore, there are clear advantages for developed countries that are not in support of cross border movement, and are worried that they may receive unwanted migrants at their borders. If they are encouraged to support affected communities on the ground and strengthen the

solutions that local communities have, it will ideally delay displacement which both favours a human rights approach for the affected people, and favours migration hesitancy in the West as well. Overall, this chapter has shown that regional approaches offer strong solutions in their own right and do not necessarily need to be led by international hard law. The Pacific case is only one example of course, with unique challenges but also advantages over other regions. This chapter can therefore not represent solutions in all other regions of the world, however it demonstrates the potential for this level of governance to be used.

5. Conclusion

This thesis has demonstrated the urgent need for climate change displacement to be addressed by the international community. There is no doubt that climate change displacement is one of the biggest global threats to human rights, as has been demonstrated with the Special Rapporteur's annual report released this year. At its release the Special Rapporteur stated that the world is faced with an 'intolerable tide of people moving from their homes due to the impacts of climate change' and due to a lacking legal definition 'people may fall through the cracks when it comes to protection'²⁷³. With climate change displacement occurring already, and predictions that it will increase significantly in the coming years, this thesis has analysed the existing international legal gap and how it may be filled.

The second chapter began with discussing the lack of comprehensive legal protection at the UN level, as existing international laws do not adequately accommodate the challenges posed by climate change displacement. The GRC, for example, proved to be an inadequate place for climate change displaced persons to seek protection. Despite the tendency in the media to use the term 'climate refugees', refugee law is clear in its definition of who may be considered a refugee. As it can not be argued that the effects of climate change constitute the persecution of a particular social group, climate change displaced persons are not able to seek protection under refugee law. Human rights law has also been touted as a viable option for protection however this thesis has shown that this is far from the case. When put to the test through the Teitiota case, international human rights law proved to be unable to fill the existing legal gap. While there was suggestion that this may change in the future, it is clear that climate change as a cause of displacement is not yet considered a serious enough threat to life so as to trigger the non-refoulement principle. Environmental law under the UNFCCC does not provide solutions either. The key issue being that

²⁷³ Office of the High Commissioner for Human Rights (OHCHR), "Intolerable Tide" of People Displaced by Climate Change: UN Expert', OHCHR, June 2023, <https://www.ohchr.org/en/press-releases/2022/06/intolerable-tide-people-displaced-climate-change-un-expert>.

environmental law is currently state to state in nature and therefore not suited to developing a law where rights holders are protected by states as the duty bearers. This chapter went on to analyse possibilities for new international law to be developed. It discussed the advantages and disadvantages of developing an entirely new convention altogether, or instead adding protocols to existing conventions. The analysis showed that while there is academic debate on the issue, and some political will, these are yet to make a significant impact on international hard law. The Special Rapporteur's report to the UN General Assembly suggesting an additional protocol to the GRC is the most recent of such developments. However, as it was only released a few weeks before this thesis was due it is too early to analyse whether it will make any serious contribution to developing hard law. What was most promising about this report however was the strong commitment to the human rights-based approach and a strong case made for why the term 'climate change displacement' should be used. It is recommended that the outcome of this report is researched further.

The third chapter analysed international cooperation and soft law approaches to filling the legal protection gap. It demonstrated that several pieces of well-established soft law do indeed exist, and have operated for quite some time already. Each of these pieces approach the issue of climate change displacement from different angles and are led by different international fora. As in hard law, the UNFCCC tended to influence its soft law towards addressing the issue as a form of adaptation. This weakens the human rights-based approach as it does not emphasise the injustice of vulnerable communities being forced to move in order for the effects of climate change to be adapted to. Nevertheless, the UNFCCC soft law does advance from its international hard law counterpart in demonstrating willingness to address the issue and therefore is an added value to the field. Likewise, where human rights hard law did not fill the international legal gap, the Global Compact on Migration made the clear link between climate change driving migration and the need for human rights protection. Addressing the issue under migration also comes with downsides yet this soft law develops the connection to climate change further than existing human rights law on the issue. Soft law regarding refugee rights did not extend the GRC or 1967 Protocol to address climate change displacement. This demonstrates a clear reluctance for refugee law to be extended by encompassing climate change displacement. State-led cooperation resulting in the Nansen Initiative and subsequent work such as the Platform on Disaster Displacement clearly demonstrated the added value of soft law. By bypassing international institutions which may seem politically stagnant, the Nansen Initiative was able to negotiate with all interested parties (whether state or non-state) on how to mainstream an international response to displacement. This showed that soft law can indeed have the effect of creating shared norms and principles without the pressure of being legally binding. With the nature of soft law being norm-setting, flexible, and open to input from all stakeholders, it is crucial that it

continues to develop while the legal protection gap remains unfilled. Importantly, it should work towards a stronger human rights-based approach so that even in principle, climate change displacees are seen as right's holders.

The fourth chapter demonstrated the potential for regional approaches on climate change displacement to complement international law, and the Pacific region was used as a case study. The Pacific region lacks a binding regional legal framework, yet it has demonstrated the feasibility of solutions to be created at the regional level. Developed countries, like New Zealand, showed a strong commitment to exploring regional legal frameworks in the future. In the meantime, they have committed to supporting climate change mitigation efforts in the Pacific, specifically aiming to avert climate change displacement while it is still possible. This was a direct response to listening to the concerns and wishes of Pasifika people who are the ones most affected in this region. With New Zealand directing climate finance to affected communities, there is support for affected communities to be able to provide their own solutions. This approach, if implemented in a just and equitable manner, can serve as a valuable lesson for the international level. Other developed states outside of the Pacific region can be encouraged to offer climate finance to their developing neighbours by witnessing the success of initiatives in the Pacific. Developed countries concerned about potential migration pressures can benefit from supporting affected communities on the ground and strengthening local solutions to avert displacement. It is crucial to recognize that empowering local communities and delaying displacement can be advantageous to all parties involved.

Each of these chapters contributed to answering the research question of this thesis: *How does international law respond to climate change induced displacement and what can a human rights-based approach add to this?* The second chapter clearly showed that international law does not respond adequately to climate change displacement, yet there are a growing number of suggestions to create new pieces of law which may change this. The third chapter demonstrated that soft law is valuable in providing a norm setting foundation, such as starting to mainstream the human rights-based approach among states while hard law is still developing. The fourth chapter showed the value of developing regional approaches that can fill protection gaps based on the specific regional context, and also incorporate the value of the human rights-based approach. The combined analysis of all these three chapters suggest that there may be strong potential for an international level framework to be developed as a norm setting umbrella, under which specific regional agreements could be formed. This could fill the need for there to be an international forum where this issue gets the attention and political support it requires, while also allowing space for regional nuances that one piece of international law could not

encompass. This thesis recommends further research into how such a framework can operate and whether states may be willing to endorse it.

In conclusion, the findings of this thesis emphasise the need to centre a human rights-based approach in addressing climate change displacement while filling the legal protection gaps in international law. While international hard law remains limited in its response, there is growing interest and pressure to explore alternative solutions. The thesis has shown that regional approaches can inform international efforts and highlight the benefits of empowering affected communities. By fostering collaboration, supporting mitigation, and directing resources effectively, it is possible to mitigate the adverse effects of climate change displacement and uphold the rights and dignity of those affected. International cooperation and concerted efforts are essential to ensure a comprehensive and effective response to this critical issue at the intersection of climate change and human rights.

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