



THE EFFECT OF THE PARIS AGREEMENT ON CLIMATE REFUGEES

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INTRODUCTION

“[.]Even if every country somehow puts the brakes on emissions, climate change would still have an impact on our world for years to come. [...]The cost will be borne by people in poor nations that are least equipped to handle it. So if we don't take the action necessary to slow and ultimately stop these trends, the migration that has put such a burden on Europe already will just continue to get worse.”¹ – Barack Obama

The biggest legal challenge concerning the world of international law today is the lack of legal tools to combat climate change as a global problem with global consequences. While politicians tend to wax lyrical regarding their efforts and expenditures on clean energy, better climate technology, financial and technological assistance to poorer nations, the reality is far from the truth. The anger in favour of the stark reality was raised by Greta Thunberg in her speech at the UN Climate Action Summit in 2019 wherein she said *“People are suffering.*

People are dying. Entire ecosystems are collapsing. We are in the beginning of a mass extinction, and all you can talk about is money and fairy tales of eternal economic growth. How dare you!”². The rising populist nature of big powers such as the USA and the UK and developing powers such as China and India have led more centralization of power and decentralization of the onus towards handling climate change as a significant effort in handling the global crisis. One of the major consequences of climate change related damages is reflected in the increased displacement not caused by wars, conflicts, internal strife but rather by the effects of climate change in specific countries.

Extreme climate change events have led to significant displacement of persons and the increase in magnitude and reoccurrence of climate events such as floods, droughts, bushfires etc. significantly complicate climate change challenges and the responses that we have in response to the situations.

‘Between 2008 and 2012, sudden-onset disasters displaced an estimated 144 million people.’³ In 2013, almost three times as many people were newly displaced by disasters than by conflict⁴. Some 22 million people were displaced in at least 119 countries, mostly by rapid-onset weather-related disasters⁵. The vast majority of such displacement, 97% between 2008 and 2013,

¹ <https://www.theguardian.com/global-development/2017/may/26/barack-obama-food-climate-change>

²<https://www.npr.org/2019/09/23/763452863/transcript-greta-thunbergs-speech-at-the-u-n-climate-action-summit>

³ Nansen Initiative, Perspective, ‘Linking Human Mobility, Disasters and Disaster Risk Reduction’ (September 2014).

⁴ Internal Displacement Monitoring Centre (IDMC), Global Estimates 2014: People Displaced by Disasters (2014) 7.

⁵ Internal Displacement Monitoring Centre (IDMC), Global Estimates 2014: People Displaced by Disasters (2014) (n 8) 7, 9



occurred within developing countries (almost 81% in Asia)⁶. The above data sets provided only account for rapid-onset or sudden weather-related disasters⁷. For long term climate change related issues, it is specifically problematic to place blame only on climate change and therefore, it is easy for states to shirk their inherent responsibilities from dealing with the crisis in a tempered but urgent manner. For example, climate change related displacement could attribute to almost 17 million internal displacements i.e. displacement within sovereign borders of states, have occurred across 148 countries and territories due to disasters⁸ which quantifies for 61% of the total displacement of people including displacement due to wars. If unchecked or left untreated, climate related displacement could affect up to 140 million people by 2050 in just three specific regions i.e. Sub-Saharan Africa, South Asia and Latin America^{9,10}. This inherently leads to the question of whether states necessarily consider the issue of climate change as one that states consider to be one where there are legal obligations to the whole world due to the importance of the obligations involved i.e. *erga omnes* obligations.

ERGA OMNES AND CLIMATE CHANGE

I. Principle of *erga omnes*

The understanding of *erga omnes* obligations stems from treaty law as well as ICJ decisions. In terms of treaty law, multilateral treaties such as the four Geneva Conventions¹¹ in which common Article 1 specifically states that the Parties respect and *ensure respect*¹² for the Geneva Conventions. The understanding of the said part regarding ensuring respect is not only seen as a right of a Party but rather the duty to claim performance of other contracting Parties of the obligations established¹³ i.e. *erga omnes* obligations. Therefore, the understanding should be that the obligation does not restrict itself as a right i.e. the right of a safe and sustainable earth safe from climate change, but it also sees it as a duty for states to adopt and claim performance in combating climate change.

In terms of ICJ Cases, the preliminary study of this concept stems from the *Barcelona*

⁶ Ibid

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https://www.kaldorcentre.unsw.edu.au/sites/default/files/HR_CC_Displacement.pdf

⁸ <https://publications.iom.int/books/world-migration-report-2020>

⁹ <https://www.worldbank.org/en/news/infographic/2018/03/19/groundswell---preparing-for-internal-climate-migration>

¹⁰ <https://qz.com/india/1806064/india-vulnerable-as-climate-refugees-surge-amid-floods-droughts/>

¹¹ International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; International Committee of the Red Cross (ICRC), *Geneva Convention for the*

Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287

¹² R.St.J.Macdonald, "Reservations under European Convention on Human Rights", RDBI 21 (1988), 429 et seq.

¹³ J.A. Frowein, "Reaction by Not Directly Affected States to Breach of Public International Law", RDC 248 (1994), 353 et seq.



Traction case¹⁴ wherein in 1970, the court tried creating a distinction between obligations owed to a particular state and obligations owed to the international community. The said principle¹⁵ was strengthened and reaffirmed in its advisory opinions on Nuclear Weapons, the Construction of the Wall in Palestine and Kosovo¹⁶. However, the said cases still do not clearly provide a systematic analysis of the nature, application and scope of the doctrine of *erga omnes*.

This inherently also would lead to the understanding that the formation of peremptory norms i.e. basic values upon which international community is built, resides as a guideline or broader version of an obligation *erga omnes*. Therefore, this would mean that all peremptory norms create obligation *erga omnes* but not all obligation *erga omnes* form peremptory norms¹⁷.

II. Application of *erga omnes* to climate change

This principle necessarily in international law parlance would be for states to acknowledge

the classification of climate change as an *erga omnes* obligation¹⁸. The second level of the application of the *erga omnes* obligation via it being a peremptory norm would be the interpretation of the said obligation under a *jus cogens* norm. The notion of *jus cogens* while largely was developed within the spectrum of treaty development and specifically treaty invalidation, the context of the same has increased beyond that scope¹⁹. This widening of scope has led to the development of a limited number of peremptory norms recognized in international law²⁰. The International Law Commission (ILC) has frequently stated a few as *jus cogens* norms which include the prohibition of aggressive use of force, the right of self-defence, crimes against humanity, prohibition of genocide²¹. Article 53 of the VCLT²² states that “*Treaties conflicting with a peremptory norm of general international law (jus cogens). A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law*” which spawns and identifies the idea that international law has certain norms which are paramount and beyond the derogation by any treaty. The

¹⁴ Barcelona Traction, Light and Power Company Ltd (Second Phase) [1970] ICJ Rep 32.

¹⁵ Wolfrum ‘Enforcing community interests through international dispute settlement: Reality or utopia?’ in Fastenrath et al (eds) From bilateral to community interest. Essays in honor of Judge Bruno Simma (2011) 1134

¹⁶ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996 ICJ Rep 226. 10 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) 2004 ICJ Rep 15; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 89

¹⁷ Crawford The International Law Commission’s Articles on State Responsibility (2002) 277.

¹⁸ Crawford The 11 International Law Commission’s Articles on State Responsibility (2002) 257

¹⁹ De Wet ‘The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law’ (2004) 15 European Journal of International Law 98-99

²⁰ Gaja ‘The protection of general interests in the international community’ (2014) 364 Collected 25 Courses of the Hague Academy of International Law.

²¹ ILC Report of the Study Group on Fragmentation of International Law: Difficulties arising 31 from the diversification and expansion of international law A/CN.4/L.682, 13 April 2006, par 374.

²² United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331,



question therefore that is raised would be as to whether action against climate change would fall under a peremptory/*jus cogens* norm. The substantiation could be achieved through the varied agreements and protocols entered into from the late 20th century. The 1992 “Earth Summit”²³²⁴ in Rio de Janeiro instituted the primary concept of sustainable development goals and collective action goals. In furtherance to the above, multiple environmental summits including the Kyoto Protocol²⁵ as well as the latest and most ambitious Paris Agreement²⁶ reinforced the mechanism for the existence of individual obligations of states (*erga omnes partes*) as well as collective goals for the international community (*erga omnes*). For example, Article 2 of the Paris Summit specifically states, “*This Agreement [...] aims to strengthen the global response to the threat of climate change, in the context of sustainable development [...]*”. The macroscopic application of climate change under a *jus cogens* norm wherein there is a growing consensus that has accepted the far reaching problems of climate change. The universality of it in terms of climate change not only providing a global right to states to protect themselves from climate change but also impose responsibilities against states which harm them. However, the application of the said *jus cogens* norm is restricted largely because of the widespread nature of

climate change and therefore, the complicated legal regime that it would involve. One of the ways to strengthen the norm would be to identify its microscopic or individual impact.

III. Climate change as a Human Rights issue

The approach in this essay would be to utilise the human rights legal regime to provide impetus to climate change to be considered as an issue which needs to be placed under the *jus cogens* norms. The attempt is to break down climate change displacement under the umbrella of human rights violations in order to solidify its position and impose a stricter obligation to states.

The UN Human Rights Council and the Conference of Parties to the UNFCCC²⁷ have recognised that climate change impacts such as droughts and rising sea levels which occur and shall continue to occur in extreme and frequent occasions shall lead to severe degradation of specific human rights guaranteed internationally such as the right to water, sanitation, housing, health and in cumulation, the right to life. Additionally, climate change effects are disproportionate in terms of it affecting minority communities, the disabled, children and the elderly in the most significant terms. These

²³ 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992)

²⁴ United Nations Framework Convention on Climate Change, opened for signature June 4, 1992, S. Treaty Doc. No. 102–38 (1992), 31 ILM 849 (1992) (entered into force Mar. 21, 1994) [hereinafter FCCC]

²⁵ Kyoto Protocol to the FCCC, FCCC Conference of the Parties, 3d Sess., UN Doc. FCCC/COP/1997/L.7/Add.1 (Dec. 10, 1997)

²⁶ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104

²⁷ United Nations Framework Convention on Climate Change (UNFCCC), The Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, UNFCCC Dec 1/COP.16, 9th plen. mtg, UN Doc FCCC/COP/2010/7/Add.1 (10–11 December 2010)

<http://unfccc.int/resource/docs/2010/cop16/eng/07a01>



disproportionate impacts raise the issue of equality in the way climate change affects people. It also in turn affects the social, cultural and economic rights of people and states as a whole. The question that is to be acknowledged is that how these rights are significantly important to climate change and specifically the impact of climate change induced displacement. The discrimination can be identified by two specific markers:

- a. Geographic: This discrimination is both on a global scale as well as within individual states. The discrimination on a global scale would be the typified impact of climate change on Small Island Developing States (SIDS) and Least Developed States (LDCs). The specific problem with SIDS are that these states are at the risk of becoming inhabitable because of the constant sea level rise and rapid degradation of their natural resource²⁸. For example, the Caribbean SIDS have had long lasting complaints of salinization of groundwater sources which drastically reduces the possibility of habitation²⁹. The first case of climate induced migration can be evidenced in the case of the low-lying Carteret Island in Papua New Guinea (a part of the Pacific SIDS) wherein 2600 persons were forced to migrate because of a significant rise in the sea level³⁰.

In a more domestic sense, the Sunderbans area of the eastern part of India and the western border of Bangladesh has been one of the hotspots for increased displacement of individuals because of the rise in levels of the rivers as well as frequent and strong flash floods affecting the areas³¹. Multiple exclaves and enclaves have been destroyed and has led to one of the most significant refugee crises in the last 20-30 years³². Furthermore, it has been projected that by 2065, southern states of the USA would be projected to lose 8% of their population which would be complimented by an increase of 9% in the north eastern states^{33,34}. Therefore geography plays a major role in creating distinction in the impacts of climate change induced displacement.

- b. Minority groups (other than class minorities): The evidence is quite staggering in terms of political, economic and social pointers which show the most vulnerable to any kind of disaster, war etc. almost always tend to be from minority communities. This is axiomatic in the case of climate change. The IPCC also identifies most vulnerable groups but does not technically label them as minorities. In their 2007 Report, they have noted that,

“Impacts of climate change are like to be felt most acutely not only by the poor, but also by

²⁸ Terry and Chui. 2012. Evaluating the fate of freshwater lenses on atoll islands after eustatic sea-level rise and cyclone-driven inundation: A modelling approach. *Global and Planetary Change*, 88-89, 76-84.

²⁹ Terry and Falkland. 2010. Responses of atoll freshwater lenses to storm-surge overwash in the Northern Cook Islands. *Hydrogeology Journal*, 18, 749-759.

³⁰ Burkett. 2011. In search of refuge: Pacific islands, climate-induced migration, and the legal frontier. *Analysis from the East-West Center* 98.

³¹<https://www.nationalgeographic.com/environment/2019/01/climate-change-drives-migration-crisis-in-bangladesh-from-dhaka-sundabans/>

³² <https://ejfoundation.org/reports/climate-displacement-in-bangladesh>

³³ <https://www.theguardian.com/environment/2018/sep/24/americas-era-of-climate-mass-migration-is-here>

³⁴ <https://www.journals.uchicago.edu/doi/abs/10.1086/697168>



*certain segments of the population, such as the elderly, the very young, the powerless, indigenous peoples, and recent immigrants, particularly if they are linguistically isolated, i.e. those most dependent on public support. Impacts will also differ according to gender*³⁵

The problem however with singling out climate change as a disaster disproportionately affecting minority communities robs them of the communities being analysed for the significant political, social and economic oppression they endure. The right to life, equality, safe environment, water, housing etc. are important rights which are important for the survival and growth of any state. The issue with climate change-based displacement is that the cost of displacement is too high for a state to bear. The migration via borders places significant costs on inviting states for their habitation. This cost is evidenced in the case of the refugee crisis in Europe wherein Germany reportedly spent around 21.3 billion euros on the rehabilitation of around a million refugees in 2016³⁶. The cost of displacement would be significantly more costly and significantly much more geopolitically taxing for any inviting state. Therefore, states should have to consider the economic harm and weigh it out for the specific benefit that addressing minority rights in a climate change perspective would provide.

The evaluation on an individualistic level also suggests the egregious harm that inaction in terms of legal precedence and tools does with regard to climate displacement. The benefit of attributing climate change as a *jus cogens* norm would be beneficial not only in terms of developing the arsenal for the most vulnerable states but also benefit the states which are the most polluting states.

WHO ARE CLIMATE REFUGEES?

The recent development of the concept of ‘climate refugee’ in the last 30 years along with the lack of legal rights bestowed to any climate related displacement, the definition of the climate refugees is one that is discussed quite often³⁷. The concept of climate refugee stems from a paper published by El-Hinnawi wherein the discussion worked around the initiation of the term ‘environmental refugees’ in 1985³⁸. He defined environmental refugees as “*those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardize their existence and/or seriously affects the quality of their life*”³⁹.

Based on the above and expanding the literature based on multiple agreements coming through like that of the Kyoto Protocol and multiple UNFCCC COPs, multiple authors have proposed methods to

³⁵ IPCC, Climate Change 2007 – Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Fourth Assessment Report of the IPCC, p. 374

³⁶ <https://www.politico.eu/article/refugee-crisis-cost-germany-over-e20-billion-in-2016/>

³⁷ Chaloka Beyani, ‘Climate Change and Internal Displacement’ (Report, Brookings Institution, October 2014) 1

³⁸ El-Hinnawi, E. (1985). Environmental Refugees. Nairobi: United Nations Environment Programme

³⁹ Berchin, Issa Ibrahim, Isabela Blasi Valduga, Jéssica Garcia, and José Guerra. 2017. “Climate Change and Forced Migrations: An Effort towards Recognizing Climate Refugees.” *Geoforum* 84: 147–150. doi:10.1016/j.geoforum.2017.06.022.



categorise such displacement/migration. Stronger typology has been created in order to devise these categories and Renaud's categorization⁴⁰ seems quite apt for the purposes of this essay. He has suggested three major categories⁴¹:

- a. Environmental emergency migrants – People who rapidly leave areas or territories in order to avoid an upcoming natural disaster or catastrophe usually fall under this category. In this case, the displacement is usually temporary despite people migrating within and outside the borders of their native country.
- b. Environmentally forced migrants – People who have no other choice but to vacate their state/country due to climate change consequences. The displacement is usually caused due to the onset of various climatic activities like rising sea levels, salinization of groundwater or extreme soil degradation. This displacement is usually permanent and is the last resort. This category is usually referred to in the most direct sense as 'climate' or 'environmental' refugees.
- c. Environmentally motivated migrants – People who leave specific countries/areas as a method of pre-emptively saving themselves from their current slow onset of climate change consequences. However, this category becomes difficult to substantiate under the definition of climate refugees as the migration is not a last resort and the people

leaving these areas have governments which can possibly undertake mitigation or adaptation techniques but either have helpless or inefficient governments. The migration is usually seen as a form or method of adaptation. For example, Kiribati has been incentivising people to move out to countries like Australia or New Zealand in order to better their lives but also to ensure that in the long term, there exists communities of the Kiribati in those countries to which the people from Kiribati might be forced to migrate⁴².

The discussion surrounding the second and the third categories usually are ones revolving the underlying question with regard to climate refugee. The issue that is most critiqued and analysed is whether in circumstances of forced migration, the term 'refugee' can be used. For this analysis, the understanding of Article 1A(2) of the Refugee Convention is necessary. The Article states:

*"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."*⁴³

⁴⁰https://eumigro.eu/sites/default/files/materials/renaudunwarnerbogardi_internationalmigration_a_decision_framework_for_environmentally_induced_migration.pdf

⁴¹ Kraler, Albert, Tatiana Cernei, and Marion Noack. 2011. "Climate Refugees: Legal and Policy Responses to Environmentally Induced Migration." Directorate-General For Internal Policies: Policy Departments Citizens' Rights and Constitutional Affairs. <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>

⁴² Stellina Jolly; Nafees Ahmad, Climate Refugees under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice, 14 ISIL Y.B. Int'l Human. & Refugee L. 216, 248(2014-2015)

⁴³ Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2)



The Refugee Convention as well as the Protocol relating to the Status of Refugees specifically deals with persecuted individuals who fall under the specific criteria set above. However, the issue is that any interpretation of the above criteria would not allow climate change-based persecution to be included in the said definition.

Several authors like Bettini argue that “*using climate refugee undermines human mobility, is not identifiable because of an inability to single out an environmental stressor as the cause of a migration and is not practical within the existing legal systems*”⁴⁴.

Other arguments are also based on the premise that opening up the term ‘refugee’ in the context of climate change would weaken refugee law as the said branching of refugee law was largely based on the need to account for socio-political persecution. The argument suggests that this ‘legal misnomer’ would lead to policies being formed in an ‘us v. them’ fashion siphoning the necessary conversation away from actual needs to that of radical xenophobia and racial/ethnic tensions⁴⁵.

However, the term is not universally panned. Some of its proponents argue that the nature of the legal misnomer surrounding the term

climate refugee is a “*misunderstanding of law as an immutable set of given norms*”⁴⁶. The connotation is that while the Refugee Convention defines the parameters of the term ‘refugee’, it however does not hold ground to be the exclusive definition provided to the term. Interpretations and legal research stems largely to broaden the horizon of the application of law and the current issue is that creating a new definition would have to hold itself to scrutiny under a novice legal regime which would itself be under stress from the international community. The expectation of the incorporation of climate change into the definition would alleviate significant stress and barriers in the current legal regime to offer protection to lots of individuals in the near future before a specific regime could be created to govern the said issue of climate induced displacement⁴⁷. In furtherance to the proponent’s argument, the necessity of the situation must also be taken into account because the crisis is real in SIDS and the effects of the same are felt across the world in different magnitudes.

However, there are academics such as Kraler who propose that the term refugee being so politically and legally strenuous to adopt would lead to general terms like ‘environmentally induced migration’⁴⁸.

⁴⁴ Bettini, Giovanni, Sarah Louise Nash, and Giovanna Gioli. 2017. “One Step Forward, Two Steps Back? The Fading Contours Of (In)justice in Competing Discourse On Climate Migration.” *The Geographic Journal* 183, no. 4: 348-358. doi: 10.1111/geoj.12192

⁴⁵ Mayer, Benoit. 2017. “Critical Perspective on the Identification of ‘Environmental Refugees’ as a Category of Human Rights Concern.” In *Climate Change, Migration and Human Rights*, edited by Dimitra Manou, Andrew Baldwin, Dug Cubie, Anja Mihr, and Teresa Thorp, 28-35. New York: Routledge.

⁴⁶ Ibid

⁴⁷ Biermann, Frank, and Ingrid Boas. 2010. “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees.” *Global Environmental Politics* 10, no. 1: 60-88. Academic Search Premier, EBSCOhost

⁴⁸ Kraler, Albert, Tatiana Cernei, and Marion Noack. 2011. “Climate Refugees: Legal and Policy Responses to Environmentally Induced Migration.” Directorate-General For Internal Policies: Policy Departments Citizens’ Rights and Constitutional Affairs. <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>



Another issue to address is the nature of judicial decisions regarding the nature of such displaced persons. There have been multiple cases of individuals filing refugee applications to Australia and New Zealand and these were individuals from Pacific Islands such as Tuvalu, Kiribati and Tonga wherein these individuals sought protection as refugees based on the impacts of climate change⁴⁹. The current nature of the Refugee Convention and its inflexible nature can be clearly elucidated in the judgements pronounced by New Zealand wherein they have held that “*differentially at risk of harm amounting to persecution due to any one of [the] five grounds*” and that “*all... citizens [of the threatened states] face the same environmental and economic difficulties’ as the applicants, thus disqualifying them from protected status*”⁵⁰

The nature of the arguments is self-defeating as the international law space does not have adequate protection measures to guarantee similar or at least par levels of protection to people affected by such displacement and therefore creates the need for the inclusion of climate change under the said legal regime.

PARIS AGREEMENT AND WARSAW INTERNATIONAL MECHANISM ON

LOSS AND DAMAGE – CLIMATE INDUCED DISPLACEMENT

Addressing climate induced displacement and climate refugees are important goals and targets of the Paris Agreement⁵¹. The Paris Agreement does not explicitly provide for the same, but it can be deduced through the goals slated under Article 2, Article 8 with regard to the application of the principle of loss and damage under the Warsaw International Mechanism on Loss and Damage (‘WIM’)⁵² and the efforts it requires states to undertake under Articles 4, 7, 9, 10, 11 and 13.

Climate refugees or climate induced displacement/migration would largely fall under the loss and damage (‘L&D’) regime as established via the WIM. However, L&D does not specifically carry any definition as such. L&D can be understood as residual impacts of climate change which have been caused despite adequate or necessary mitigation and adaptation standards⁵³. The core principle behind L&D is that people are put at risk due to lack of adaptation to climate change and growing greenhouse gas concentration. Furthermore, it also comes with the understanding that there are limits to mitigation and adaptation strategies which would cause unavoidable damage. Therefore, the need for a separate legal regime

⁴⁹ For Australian cases, see, eg, 1004726 [2010] RRTA 845 (30 September 2010); 0907346 [2009] RRTA 1168 (10 December 2009); N00/34089 [2000] RRTA 1052 (17 November 2000); N95/09386 [1996] RRTA 3191 (7 November 1996); N99/30231 [2000] RRTA 17 (10 January 2000). For New Zealand cases, see, eg, AF (Tuvalu) [2015] NZIPT 800859 (20 October 2015); AC (Tuvalu) [2014] NZIPT 800517-520 (4 June 2017); Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZAR 688 (‘Teitiota’); Refugee Appeal No 72185/2000 [2000] RSAA (10 August 2000).

⁵⁰ Refugee Appeal No 72189/2000 [2000] RSAA (17 August 2000) 2–3 [4]

⁵¹ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104

⁵² <https://unfccc.int/sites/default/files/resource/docs/2013/cop19/eng/10a01.pdf>

⁵³ https://ecbi.org/sites/default/files/FinalVersionLoss%26Damage_0.pdf



governing this unavoidable damage would become necessary⁵⁴.

L&D is hugely contentious despite being adopted into Article 8 of the Paris Agreement because developed states find themselves in the precarious position of being held responsible for their actions which have resulted in significant damage to vulnerable states. The developed states place these L&D strategies under the ambit of adaptation strategies as a method to avoid insurance or risk reduction negotiations⁵⁵.

The history of L&D started with the AOSIS countries in 1991 requiring financial support via an insurance mechanism. However, after 22 years of significant development, the WIM came into fruition. Some of the key elements of the WIM are included in Paragraph 5 of Decision 2/COP.19 which include but are not limited to:

“(a) Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts ...; (b) Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders ...; (c) Enhancing action and support, including finance, technology and capacity building to address loss and damage”⁵⁶.

These specific functions provided in Paragraph 5 enable discussions around loss and damage in not only financial terms but also in terms non-economic L&Ds which include displacement and migration. However, the understanding of how the Paris Agreement in tandem with the WIM deal with Loss and Damage is based on the interplay between Article 8 of the Paris Agreement along with paragraphs 47 – 51 of Decision 1/COP.21 of the Paris Agreement. While WIM provides for the necessary regime for determining L&D, the effect or impact of Article 8 of the Paris Agreement is relegated by paragraph 51. It is worth taking a closer look at the two elements of paragraph 51:

- a. Article 8 does not provide a basis for ‘any liability or compensation’; and
- b. Article 8 does not involve ‘any liability or compensation’.

Tanner in his paper⁵⁷ however suggests that the L&D regime under WIM tries to accommodate for social security and welfare schemes, long term financing for slow-onset events and most importantly internationally viable agreements on the rights and status of people affected by climate induced migration/displacement i.e. climate refugees. The nature of this displacement must not just account based on the uprooting of one’s life from the specific land/area but also the uprooting of cultural and social rights. Communities could face losses ranging from ancestral homes and culturally significant

⁵⁴ M. Burkett, ‘Loss and Damage’, 4:1–2 Climate Law (2014), 119, at 128.

⁵⁵ <https://mission2020.global/wp-content/uploads/COP25-Loss-and-Damage-and-the-Warsaw-International-Mechanism.pdf>

⁵⁶ Decision 2/COP.19, n. 33 above, at paragraph 5

⁵⁷ Tanner T, Surminski S, Wilkinson E, Reid R, Rentschler JE, Rajput S (2015) The Triple Dividend of

Resilience: Realising development goals through the multiple benefits of disaster risk management. Global Facility for Disaster Reduction and Recovery (GFDRR) at the World Bank and Overseas Development Institute (ODI), London. https://www.gfdrr.org/sites/default/files/publication/The_Triple_Dividend_of_Resilience.pdf



places of worship etc. which based on the risk of submersion in most of the AOSIS nations⁵⁸. An early example of such mechanisms would be Fiji's purchase of 20 square kilometres in Fiji in order to resettle families in the future⁵⁹. These efforts cannot technically be classified as mitigation or adaptation measures as they are largely compensatory in nature for the L&D suffered.

With regard to climate induced displacement, the Task Force on Displacement (TFD) was formed in order to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change”. The TFD in its plan of action as well as its output has identified 6 major markers based on the New York Declaration for Refugees and Migrants⁶⁰.

These markers included⁶¹:

1. Recognition of the history and multi-faceted nature and dimensions of migration caused by climate change;
2. Bringing to the attention of the world the need to make broad spectrum amendments and changes to the migration policies of states as well as grasp the link between climate change, forced migration and its

impact on the achievement of the Sustainable Development Goals (SDGs);

3. Recognizes that the drivers of human migration and mobility stem from natural disasters and that significant environmental degradation and damage to livelihood are caused by the impacts of climate change;
4. Bringing to the attention of the world the Migrants in Countries in Crisis Guidelines (2016) and the Nansen Initiative Protection Agenda (2015) that in addition to the WIM as well as the Paris Agreement provide additional guidance and have led to state and international interest in dealing with disaster and climate based displacement;
5. Identification of the large and insurmountable impact and effect of horde migration (large movements of population) on the environment as well as economies; and
6. Emphasis on the Paris Agreement's achievement in terms of the goals it has set out to states under Article 2 as well as other supplementary articles to compliment the achievement of the said goals.

Based on the above, the TFD also has identified data on nations and their preparedness with regard to climate change induced migration. “The review of the available documents for 66 countries revealed that 35 of them⁶² (or 53 per cent)

⁵⁸ Thomas A, Benjamin L (2017) Policies and mechanisms to address climate-induced migration and displacement in Pacific and Caribbean small island developing states. International Journal of Climate Change Strategies and Management. <https://doi.org/10.1108/IJCCSM-03-2017-0055>

⁵⁹ Goering L (2017) Climate migration muddled by legal confusion in Pacific islands. Reuters, 9 November. <https://www.reuters.com/article/us-climatechange-pacific-migration/climate-migration-muddled-by-legal-confusion-in-pacific-islands-idUSKBN1D9285>

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http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1

⁶¹ Ionesco, D. and E. Mach, Migration, Environment and Climate Change Division (IOM) (2016), Environmental Migration Portal - UN Summit for Refugees and Migrants, available from www.environmentalmigration.iom.int/un-summit-refugees-and-migrants.

⁶² 14 African countries, 6 Asia Pacific countries, 10 Western and European countries and 5 Latin American and Caribbean countries - <https://unfccc.int/sites/default/files/resource/20180917%20WIM%20TFD%20I.1%20Output%20final.pdf>



refer to climate and environmental considerations in their national migration legislations, policies or strategies. This shows an awareness of the climate dimensions within the national migration policy area, but that these concerns are far from being mainstreamed in national human mobility legislation, policies or strategies."⁶³

However, it is also important to understand that while the TFD does some great analysis and provides necessary output, the legal regime surrounding the determination of action on these findings is left uncertain.

Paragraph 49 of Decision 1/COP.21 requests the WIM *'to establish ... a task force ... to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change'*⁶⁴ Paragraph 49 works within the scope of Article 8.4(c)-€ of the Paris Agreement wherein the reference to the term 'displacement' is based on the recommendations largely of LDCs, SIDS and developing countries. However, this strain is largely withdrawn from the developed states and therefore, while the current two-year plan of the TFD seems to provide short term benefit via its action area 6 on migration, displacement and human mobility, long term planning is necessary.

In order to summarise the outlook of climate induced displacement and the status of climate refugees, M.J. Mace and Roda Verheyen state that *"addressing displacement methodically over the long term, is certainly an area of work in which*

'supporting parties' will not be sufficient and an international framework will have to be developed by the WIM or the parties to the UNFCCC and Paris Agreement. With respect to displacement, the WIM and the appointed task force could draw out approaches which will overlap with issues of refugee law, expropriation and re-settlement methodologies. This is inevitable work which cannot be done by parties individually."⁶⁵.

CONCLUSION

The Covid-19 pandemic has made the world realise how well-connected it is and in actuality, a climate crisis can be slowed down or avoided with maximum support. The arsenal in their armoury keeps running short or loses traction.

The understanding of climate refugee, displacement and forced migration as a crisis and its acknowledgement as an obligation *erga omnes* must be resolute in order to ensure that the goals of the Paris Agreement are achieved as well as making it safer to ensure better and stronger projects for the benefit of humanity.

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⁶⁴ Decision 1/COP.21, n. 2 above, at paragraph 49

⁶⁵ M.J. Mace* and Roda Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement', RECIEL 25 (2) 2016. ISSN 2050-0386



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LIST OF ABBREVIATIONS

<u>AOSIS</u>	Alliance of Small Island States
<u>COP</u>	Conference of Parties to the UNFCCC
<u>ICRC</u>	International Committee for the Red Cross
<u>ICJ</u>	International Court of Justice
<u>ILC</u>	International Law Commission
<u>L&D</u>	Loss and Damage
<u>LDC</u>	Least Developed States
<u>NYU J Int'l L & Pol</u>	New York University Journal of International Law and Politics
<u>SDG</u>	Sustainable Development Goals
<u>SIDS</u>	Small Island Developing States
<u>TFD</u>	Task Force on Displacement
<u>UK</u>	United Kingdom
<u>UN</u>	United Nations
<u>UNFCCC</u>	United Nations Framework Convention on Climate Change
<u>UNTS</u>	United Nations Treaty Series

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<u>USA</u>	United States of America
<u>VCLT</u>	Vienna Convention on the Law of Treaties
<u>WIM</u>	Warsaw International Mechanism on Loss and Damage

