Scientific Research Publishing

Beijing Law Review, 2025, 16(2), 1260-1285
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Migration, "Climate Change Refugees" and Global Justice

Solomon E. Salako

Faculty of Business, Law and Criminology, Liverpool Hope University, Liverpool, United Kingdom
Email: salakos@hope.ac.uk

How to cite this paper: Salako, S. E. (2025). Migration, "Climate Change Refugees" and Global Justice. *Beijing Law Review, 16,* 1260-1285.
https://doi.org/10.4236/blr.2025.162064

Received: May 20, 2025
Accepted: June 27, 2025
Published: June 30, 2025

Copyright © 2025 by author(s) and Scientific Research Publishing Inc.
This work is licensed under the Creative Commons Attribution International License (CC BY 4.0).
http://creativecommons.org/licenses/by/4.0/

Open Access

Abstract

The ill-effects of climate change caused by the emission of greenhouse gases are droughts; storm surges which destroy infrastructure, housing and crops; and rise in sea levels which adversely affect small island states which could eventually be submerged and force citizens who flee because of the ill-effects of climate change to be described as 'climate change refugees'. Refugees under the 1951 Refugee Convention and its 1967 Protocol are persons who cross international borders and have a well-founded fear of persecution. Climate change refugees are persons who flee for reasons other than persecution and who do not have legal status. And yet, preventive responses of international law to climate change refugees raise the issues of global justice. The objects of this paper are: i) to evaluate the proffered extension of International Refugee Law to climates change refugees; ii) to discuss the role of international human rights law as a complementary protection for climate change refugees; iii) to evaluate the protection under international environmental law; iv) to discuss the migration options; v) to discuss disappearing states, statelessness and relocation; and vi) to assess critically the feasibility and desirability of a Climate Change Treaty based on a monist-naturalist conception of global justice privileging human dignity as one of its guiding principles.

Keywords

Migration, Climate Refugees, International Law, Human Rights, Global Justice, Jurisprudence

1. Introduction

The phrase 'refugees and migrants' is a cause of concern in academic discourse because of definitional problems. In ordinary parlance, the term 'migrants' has two different meanings: the inclusivist and the residualist meanings. (Carling,

2023)[1] According to the inclusivist meaning, a migrant is anyone who has moved away from their country of residence with the intention or expectation of staying in another country for some time, irrespective of the reasons for migrating. This definition covers overseas workers, international students, refugees, those who are adversely affected by climate change, and other groups with special vulnerabilities.[2] (The United Nations High Commission for Refugees is averse to the inclusivist definition.[3])

According to the residualist definition, 'migrants' are the residual and diverse groups who are not refugees. The residualist view not only suggests that migrants are those without a legitimate need for protection from persecution but also deprives us of a non-judgmental way of recognising that migrants might be refugees who have a legitimate need for protection under International Refugee Law.

In legal parlance, and consonant with the residualist view, Article 1A (2) of the UN Convention Relating to the Status of Refugees 1951 provides the following definition of a 'refugee' as a person who:

> "…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular special group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[4]

The inhabitants of small island states such as Tonga, Tuvalu, Kiribati, the Marshall Islands and the Maldives whose islands could be submerged by rise in sea level, those in Bangladesh subject to persistent flooding, and those in the Sahel[5] region of Africa who face persistent drought, and who are likely to flee their countries due to the adverse effects of climate change caused by the emission of greenhouse gases do not meet the definition of 'refugees' stated in the 1951 Refugee Convention. This definition requires i) a fear, ii) that is well-founded; iii) of persecution, and iv) based on reason of race, religion, nationality, membership of a social group or opinion. Climate change and environmental grounds are not recognised grounds, and the 1967 Protocol relating to the Status of Refugees[6] did not review the substantive context of the definition of 'refugees'.

[1]For an overview of the inclusivist and the residualist meanings.

[2]Groups with special vulnerabilities include children, trafficked persons and those seeking refuge from gendered violence.

[3]See *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4/Eng/Rev. 1, para. 62.

[4]Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954). https://www.unhcr.org

[5]The Sahel region is the region between the Sahara Desert in the north and Sudanese Savannah in the south.

[6]Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967). https://www.unhcr.org

In this paper, we shall discuss the following themes:

i) A critical assessment of the proffered extension of International Refugee Law to climate change refugees;

ii) The role of international human rights law as a complementary protection for climate change refugees;

iii) Protection of climate change refugees under environmental law;

iv) The migration options;

v) Disappearing states, statelessness, and relocation;

vi) A critical assessment of the feasibility and desirability of a Climate Change Treaty based on a monist-naturalist conception of justice.

But, first, let us discuss, in a lexical order, attempts to extend International Refugee Law to climate change refugees.

2. A Critical Assessment of the Proffered Extension of International Refugee Law to Climate Change Refugees

There are three schools of thought on the 1951 Refugee Convention and the challenges facing the international community on climate change refugees. The first school contends that the treaty should be extended to respond to the challenges of the 21st century, such as climate change and natural disasters. (Osóbka, 2021) The second school of thought opines that a Climate Change Treaty is not only feasible but also desirable (Docherty & Giannini, 2009), and the third school is averse to the promulgation of a Climate Change Treaty. (McAdam, 2011) While we defer the discussion of the arguments for and against the promulgation of the Climate Change Treaty to the penultimate section of this paper, it is pertinent to discuss two regional treaties as paradigms for the proponents of extending the International Refugee Law.

The first treaty is the OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (the 1969 AU Convention on Refugees).[7] Article 1 (1) of the 1969 AU Convention on Refugees reflects the definition of a refugee contained within the 1951 Convention and its 1967 Protocol. Article 1 (1) of the 1969 AU Convention, which significantly extends the scope of the 1951 Refugee Convention, states that:

"The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

[7]The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) (adopted by the Assembly of the Heads of State and Government, Addis Ababa, 10 September 1969; came into force 20 June 1974).
https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problem-africa
The African Union (AU) was established through the Adaptation of a Constitution in the Lome Summit, Togo, on 11 July 2000. The AU replaced the OAU and references within the existing treaties should now be read as AU.

This extended definition was designed to address the political instability in Africa arising from the transformation of colonial frontiers into international frontiers, which fuelled discontent of many African peoples, resulting in upheaval in states such as Sudan, Chad, Ethiopia, and the Democratic Republic of Congo, leading to forced movement, evacuation or relocation. (Nicolosi, 2014)

Political instability in Africa and Central America had similar consequences. The Cartagena Declaration on Refugees 1984,[8] a non-binding instrument used in Central America, was inspired by the 1969 AU Convention. (Arboleda, 1995) Article III (3) of the Cartagena Declaration recommended that the definition of 'refugee' used in Central America be extended in order to include "persons who have fled their home country, owing to generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order."

In both the 1969 AU Convention and the Cartagena Declaration 1984, the phrase "events [or circumstances] seriously disturbing public order" was adopted. The issue is whether displacement on account of seriously disturbing public order encompasses catastrophes such as droughts, storm surges, and a rise in sea levels. To resolve this issue, two pertinent questions must be answered:

i) What is meant by 'public order'?

ii) How far are the states prepared to extend the phrase to climate-induced change?

The term 'public order' is used in Article 21 (the right to peaceful assembly) and Article 22 (the right to freedom of association with others) of the International Covenant on Civil and Political Rights 1966 (ICCPR). Both Articles provide for the possibility of legitimate restrictions on the exercise of these rights "in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of rights and freedoms of others".[9] Neither right has generated much jurisprudence, but 'public order' is defined as "the sum of rules which ensure the peaceful and effective functioning of society" (Joseph et al., 2005) and '*ordre public*', the equivalent French concept, which applies more in private law sphere rather than as a common law notion is not an exact translation of public order. (Joseph et al., 2005: p. 530) The term 'public order' is invoked in terms of internal security or stability.

The answer to the second question, 'how far are states prepared to extend the phrase (seriously disturbing public order) to climate change?' is that nothing can be gleaned from the phrase, suggesting the inclusion of climate-induced change. Edwards contends that the extension of the 1969 AU Convention and the Cartagena Declaration 1984 to climate change remains only a theoretical possibility and

[8]The Cartagena Declaration on Refugees 1984 (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama on 22 November 1984). https://www.oas.org

[9]See Articles 21 and 22 (2) of the ICCPR.

that while there may be some State practice to suggest that climate change refugees merit protection under the AU Convention, this is not backed by *opinio juris*. (Edwards, 2016) While International Refugee Law may be "a cumbersome framework for addressing flight from climate change related impacts" as postulated by McAdam, (McAdam, 2012a) the complementary protection provided by the Human Rights Law for those whose rights are adversely affected by climate change is worthy of critical analysis; and to this we now turn.

3. International Human Rights Law as a Complementary Protection for Climate Change Refugees

Complementary protection is used here to describe the protection granted to individuals under Human Rights Law beyond 'the refugee' category to include people at risk of arbitrary deprivation of life, torture, cruel or inhuman or degrading treatment or punishment; and claims based on climate change such as right to fresh water, health, culture and, in extreme cases, self-determination.

3.1. Articles 2 and 3 of the ECHR

Article 2 (the right to life) and Article 3 (the prohibition of torture, inhuman or degrading treatment, or punishment) of the European Convention for the Protection of Fundamental Rights and Freedoms 1950 (hereinafter the European Convention on Human Rights [ECHR]) are used conjunctively to provide a balancing test between the interests of the individual and the State, placing *refoulement* out of reach in all but the most exceptional cases. In *Soering v United Kingdom*,[10] the European Court of Human Rights (ECtHR) took the view that extradition to the United States, where the applicant was likely to receive the death sentence for murder, would contravene Article 3 of the ECHR. In *Budayeva v Russia*,[11] the ECtHR held that the State's duty to protect life (Article 2 of the ECHR) extends to the protection from natural disaster; and, by logical extrapolation, to climate-induced displacement. Article 3 of the ECHR and Article 7 of the International Covenant on Civil and Political Rights 1966 (ICCPR)[12] broaden *non-refoulement* further to prevent removal in cases of 'inhuman or degrading treatment or punishment' defined in *The Greek Case*[13] as follows: "inhuman treatment" means such "as deliberately causes severe suffering, mental or physical and "degrading treatment" means that which "grossly humiliates the individual before others or drives him to act against his conscience". Taking cognisance of *The Greek Case*, European Convention jurisprudence has developed complementary protection of socio-economic rights such as the right to health and recognising the lack of treatment the receiving country would be able to provide to the applicant who was in the advanced

[10](1989) 11 EHRR 439.

[11]App. nos. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (ECtHR, 20 March 2008).

[12]See, also, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1985) 7 EHRR 325.

[13](1969) 12 Yearbook of European Convention on Human Rights 186.

stages of AIDS and had no family in the receiving state in *D v United Kingdom*;[14] and extended "inhuman or degrading treatment" (as defined) to a situation of extreme material poverty in *MSS v Belgium and Greece*;[15] and to people who were returned to Somalia who faced a real risk of treatment contrary to Article 3 in *Safi and Elms v United Kingdom*.[16] Article 3 is an absolute right and, therefore, States Parties cannot derogate from it.[17]

3.2. The Right to Health

Apart from raised sea-levels and eventual submergence of small state islands, the increased temperatures due to the increase in the atmospheric concentration of greenhouse gases result in an increase in the number of people exposed to malaria, dengue fever, and cholera in Sub-Saharan Africa and elsewhere.

The right to health of those suffering from the ill effects of climate change is protected in the following United Nations and regional human rights instruments:

1) The WHO and the Right to Health

The first and second preambular statements to the Constitution of the World Health Organization (WHO) 1946 read as follows:

> "Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions."

2) The Universal Declaration of Human Rights 1948 (UDHR)

Article 25 (1) of the UDHR provides:

> "1. Everyone has the right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

3) Article 12 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)

Article 12 (1) of ICESCR reads as follows:

> "The States Parties to the present covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." (emphasis added)

The term "recognise" has been chosen to give the provision less operative force and to enable States Parties to construe the meaning more or less liberally and to

[14](1997) 24 EHRR 23.

[15]App number 306 96/09 (21 January 2011).

[16]App numbers 8319/07 and 11449/07 (ECtHR, 28 June 2011).

[17]Saadi v Italy (the UK Intervening) (2009) 49 EHRR 30.

show that the provision is hortatory, and not mandatory.

4) Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)

Article 12 of the CEDAW stipulates the right of women as follows:

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning."

Article 12 of CEDAW focuses on equal access to health care facilities for women.

5) Article 24 of the Convention on the Rights of the Child (CRC)

Article 24 (1) of CRC reads as follows:

"1. States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her rights of access to such health care services."

6) European Union

i) Article 11 of the European Social Charter (ESC) reads as follows:

"With a view to ensuring the effective exercise of the right to protection of health, the High Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

1. To remove as far as possible the cause of ill health;
2. To provide advisory and educational facilities for the preservation of health and the encouragement of individual responsibility on matters of health;
3. To prevent epidemics, endemic, and other diseases as much as possible."

ii) Article 3 of the Council of Europe Convention on Human Rights and Biomedicine 1997 reads as follows:

"Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to healthcare of appropriate quality."

This modest provision does not include the "right to health" but focuses on access to health care facilities. It is modest because it states that "health needs and available resources" are to be taken into account.

7) Inter-American System

Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") reads as follows:

"1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental, and social well-being."

In addition, Article 11 of the Protocol proclaims the right to a healthy environment:

> "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
> 2. The States Parties shall promote the protection, preservation, and improvement of the environment."

8) African System

Article 16 of the African Charter on Human and Peoples' Rights 1981 provides:

> "1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
> 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

The first paragraph of this provision has been inspired by Article 12 (1) of the ICESCR 1966, as instantiated above. However, unlike Article 12 (1) of the ICESCR, the Article does not enumerate clear undertakings for the State in the second paragraph.

3.3. Cultural Rights

Several definitions of the term "culture" have been proffered by both international legal scholars and anthropologists. As for the former, culture is perceived as "the accumulated material heritage of humankind in its entirety or of particular groups" (Xanthaki, 2007). From this perspective, culture is viewed as capital that creates rights either for the individual, the state, or humankind. For anthropologists, 'culture' means

> "the totality of the knowledge and practices both intellectual and material, of the particular groups of a society, and at a certain level of a society itself as a whole. From food to dress, from household techniques to industrial techniques, from forms of politeness to mass media, from work rhythm to the learning of family rules, all human practices, all invented and manufactured materials are concerned and constitute, to their relationships and their totality, 'culture'. (Pratt, 1988)

The right to culture has been translated, re-articulated, or reconceptualised (Morley & Chen, 1996) as the right to equal access to the accumulated cultural capital, and the right of states to protect the culture of indigenous peoples. Hanning (1996) defines 'indigenous peoples' as human groups that have all or some of the five characteristics. These characteristics are:

1. People who are descendants of the original inhabitants of a territory.
2. Nomadic or semi-nomadic peoples such as shifting cultivators.
3. People without centralised political institutions who are organised at the

level of community.

4. People who have all the characteristics of a national minority who share a common language, religion, or culture.

5. Individuals who consider themselves indigenous and are recognised as such.

Those adversely affected by climate change who are likely to flee from their island states, such as Tonga, Tuvalu, Kiribati, and the Marshall Islands, or from droughts, such as people in the Sahel region of Africa, are indigenous peoples as defined above. Prior to the Universal Declaration on Rights of Indigenous Peoples 2007 (UNDRIP), numerous human rights instruments were promulgated to protect the cultural rights of minorities, notable among which are Article 27 of the International Covenant on Civil and Political Rights 1966, Article 3 of the International Covenant on Economic, Social and Cultural Rights 1966, the International Convention on the Elimination of All Forms of Racial Discrimination 1966, and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic or Linguistic Minorities 1992. These instruments are ill-equipped to deal with the cultural rights of indigenous peoples (as defined) because of the substantial difference between indigenous and non-indigenous understandings of the culture, the concept of cultural property inscribed in international law, and the focus on states rather than peoples as beneficiaries of the protection of cultural objects. (Xanthaki, 2007) Article 11 of UNDRIP protects past, present and future manifestations of culture such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature; and Article 12 of UNDRIP protects spiritual and religious traditions, customs and ceremonies while they remain in their territories, and even when they are relocated.

3.4. The Right to Self-Determination

The peoples' right to self-determination was first promulgated in the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), which both entered into force in 1976. The first Article of both Covenants is identical:

Article 1

"1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.

2. All peoples may, for their own ends, freely dispose of their own natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of their own means of subsistence."

There are similar provisions in Article 20 of the African Charter on Human and Peoples' Rights 1981 and in Articles 3 and 4 of UNDRIP 2007. There are two as-

pects of self-determination: the internal and the external aspects. External self-determination is the self-determination for colonial peoples that ceases to exist under customary international law once it is implemented, that is, once the people have attained self-government. Internal self-determination, unlike external self-determination, is an ongoing right of the people to choose their own political and economic regime; (Cassese, 1998) and is afforded to peoples while in their territory and, even when they are relocated 'as peoples' not as individuals to another territory, due to climate induced displacement insofar as they have not been integrated or assimilated into the host nation. The International Court of Justice recognised the peoples' right to self-determination in numerous cases.[18]

4. Protection under International Environmental Law

The concept of environment did not exist until the 1960s, even though what we now call the environment, such as open spaces, scarce resources, and pollution, predates the 1960s. The 1985 Vienna Convention was the first treaty to address global atmospheric issues by adopting measures to protect human health and the environment against the adverse effects resulting from or likely to result from human activities that adversely affect the ozone layer.[19]

The World Commission on Environment and Development was established in 1983 by the United Nations General Assembly and the authors of its report (the Brundtland Report) coined the term "sustainable development" which means a process that "meets the needs of the present generation without compromising the needs of future generations to meet their needs." (WCED, 2005) In 1988, the World Meteorological Organisation and the United Nations Environmental Programme established the Intergovernmental Panel on Climate Change (IPCC), which was charged with assessing the risks of climate change caused by human activities. The IPCC, in the first of its five reports in 1990 stated that "the balance of evidence suggests that there is a discernible human influence in climate change" (IPCC, 1990) and in its fifth report stated that "global warming is unequivocal and that the likelihood that humanity is causing it is 'extremely likely', which meant, 95–100 per cent certainty." (IPCC, 2013)

There are five phases in the evolution of the climate change regime. The first phase is the establishment of the United Nations Framework Convention on Climate Change 1992 (UNFCCC). The UNFCCC, signed at the United Nations Conference in Rio in 1992, established commitments to stabilise greenhouse gas concentration and a financial mechanism and commitment by developed country parties to provide financial resources for meeting certain incremental costs and

[18]See *Namibia Advisory Opinion* (1971) ICJ Rep. 16, para. 52, *Western Sahara Advisory Opinion* (1975) ICJ Rep. 12, para. 36, *Frontier Dispute* (*Burkina Faso v Mali*) (1986) ICJ Rep. 554, para. 25, *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (1992) ICJ Rep. 240, *East Timor* (*Portugal v Australia*) (1995) ICJ Rep. 90, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep. 136, and *Kosovo Advisory Opinion* (2010) ICJ Rep. 403.

[19]Convention for the Protection of the Ozone Layer (Vienna) 22 March 1985, in force 22 September 1988, 28 ILM 1529 (1985) (1985 *Vienna Convention*).

adaptation measures. The second phase is the Kyoto Protocol 1997, which stated that States Parties agreed to reduce their collective emissions of the six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbon, perfluorocarbon, and sulphur hexafluoride) by at least five per cent by 2008-2012 (Article 3).[20] The United States, a country with four per cent of the world's population, accounts for 25 per cent of the world's carbon dioxide emissions, but refused to ratify the Protocol. The third phase is the Copenhagen Accord 2009 which is not a legally binding agreement but a political agreement by a group of 28 countries including all the world's major economies to limit climate change to no more than two degrees Celsius and a pledge and review "for mitigation commitment or action by both developed and developing countries."[21] The fourth phase is the Paris Agreement 2015 which, in its preambular statements, recognised i) the Parties to the Agreement as Parties to the UNFCCC, ii) specific needs and particular circumstances of developing country Parties, and iii) the fundamental priority of safeguarding food security and ending hunger and the particular vulnerabilities of food production systems to the adverse impacts of climate change. The purpose of the Paris Agreement is to strengthen the global response to the threat of climate change in the context of sustainable development, make efforts to eradicate poverty, and limit average temperature to well below two degrees Celsius (Article 2(1)).[22] President Donald J. Trump, in his first term of office, withdrew the United States from the Paris Agreement. The fifth phase is the Marrakech Climate Conference of 2016.[23] The Conference demonstrated that the implementation of the Paris Agreement was underway and that the spirit of climate change continued. Since then, several Conferences of the Parties have been held.[24]

The problem with the instruments of global climate change regime is that neither the UNFCCC 1992 nor the Kyoto Protocol 1997 includes any provisions for those who are adversely affected by climate change, and what is more, the Copenhagen Accord 2009 is not legally binding and fails to provide a "binding" commitment on the mitigation of climate change. Thus, the protection of those adversely affected by climate change must now be considered under the principle of community of interests in international environmental law and provisions of international human rights law.

The principle of community of interests in international environmental law can be illustrated by reference to two cases. In the first case, *the Case Concerning the Territorial Jurisdiction of the International Commission on River Oder* (1929)[25], the Permanent Court of International Justice (PCIJ) held that the utilisation of

[20]Kyoto Protocol to the United Nations Convention on Climate Change (Kyoto Protocol 1997).

[21]Report of the Conference of the Parties on its fifteenth session held in Copenhagen from 7 to 19 December 2009, FCCC/CP/2009/11/ADD1 (30 March 2010).

[22]Paris Agreement on Climate Change 2015. https://www.un.org

[23]Marrakech Climate Change Conference 2016. https://www.climateaction.org

[24]For example, the Conference of Parties (COP29) held in Baku, Azerbaijan from November 11 to 22, 2024 focused on issues such as climate finance, updated Nationally Determined Contributions, aligning biodiversity and climate and agreeing on the specifics of the Global Goal of Adaptation.

[25]Judgment No. 16, PCIJ (1929) Ser. A. No. 23, 27.

rivers, including their flow, was subject to international law. The PCIJ noted that "the community of interests" in a navigable river was the basis of a common legal right, the essential features of which were i) equality of all riparian users in the use of the whole course of the river, and ii) the exclusion of any privilege of any one riparian user. Some seventy years later, in *Kasikili/Sedudu Island*,[26] the International Court of Justice extended the principle of community of interests to non-navigable rivers. This elastic principle could be used to develop new principles for climate change and its attendant environmental problems, such as the climate change refugee issue, water stress, and the resolution of climate-induced conflicts. But there is one pertinent question: Are environmental rights part and parcel of international human rights? Put differently, is there a right to a 'clean environment'? The answer is in the affirmative. Articles 19-24 of the African Charter on Human and Peoples' Rights 1981 (ACPHR), Article 11 of the San Salvador Protocol to the American Convention on Human Rights 1988, and the United Nations Declaration on the Rights of Indigenous Peoples 2007 endorse, expressly or impliedly, substantive environmental human right to a 'clean environment'. Although the conceptualisation of 'clean environment' as an inalienable right under the European Convention on Human Rights has been doubted,[27] the European Court of Human Rights has shown a greater willingness to environmental claims in cases engaging Article 8 of the ECHR, where a balance must be struck between the individual and community interests.[28]

Article 24 of the ACPHR provides people with a right to "a general satisfactory environment favourable to their development". The right was interpreted in *SERAC v Nigeria*[29] as imposing an obligation on the state to adopt measurable measures to prevent pollution and ecological degradation, to promote conservation, and to pursue the concept of sustainable development. Again, Article 11 of the San Salvador Protocol to the American Convention on Human Rights provides:

> "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
> 2. The State Parties shall promote the protection, preservation, and improvement of the environment."

Although there is no provision regarding the justiciability of the above provisions in the Protocol, the Inter-American Commission on Human Rights has linked environmental degradation and human rights when deciding cases regarding indigenous peoples' rights.[30]

[26](1999) ICJ Rep. 1045.

[27]*X and Y v Federal Republic of Germany*, 15 DR161 (1976).

[28]See *Powell and Rayner v United Kingdom* (1990) 12 EHRR 335 and *Lopez v Spain* (1995) 20 EHRR 277 discussed in Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law*, 3rd edn. Cambridge: Cambridge University Press, 2012. (Sands & Peel, 2012: pp. 782-783)

[29]155/96. 15th Activity Report of the AComm HPR (2001-2002).

[30]See, for example, *Yanomami Indians v Brazil*, IA Communication HR Res 12/85 (5 March 1985) where the Inter-American Commission held that the construction of a road through the applicants' traditional land violated the right to life and the right to health.

The protection under International Human Rights Law and Environmental Law of individuals or groups adversely affected by climate change is articulated above. However, there are two pertinent questions: i) Are individuals or groups 'subjects' or 'objects' of international law? ii) If individuals or groups are not 'subjects' but 'objects' of international law, do they have the right to enforce or promote the enforcement of decisions favourable to them?

The first question is about the status of an individual or a group under international law. The contemporary approach is that States are primarily the subjects of international law, but an individual or a group may be regarded as a subject of international law and as possessing international legal personality; and that terms such as "full subject", "passive subject", "limited subject" and "ordinary subject" are used when describing the status of an individual or group in international law. (Lauterpacht, 1947; Lauterpacht, 1948; Parlett, 2008; Trindade, 2010)

The traditional positivist doctrine of international law is that States are the sole subjects of international law, and the individual or group is the object. (Phillimore, 1879; Schwarzenberger, 1957; Chapman, 2012) Crawford stated that although there was no general rule precluding individuals or groups from being a subject of international law, it was unhelpful to classify them as international legal persons because of a lack of full capacity. (Crawford, 2012) The term "international legal person" is used only to designate an entity that enjoys abundance or density of rights and not an entity that has only "selective" or "particular" or "limited" rights. (Korowicz, 1956; Johns, 2010; Peters, 2016)

The answer to the second question is that the individuals or groups protected by rules promulgated in human rights treaties and environmental law are still regarded as objects of international law. This is based on the assertion that substantive rights that are laid down in human rights treaties may only be exercised within the domestic legal system. Where the individual or group is given only a procedural right to initiate international proceedings before an international body with a view to determining whether the State complained of has violated a treaty to the detriment of the individual or group, the right is usually limited to forwarding complaint for the complainant is not allowed to participate in the proceedings. There are three exceptions: i) the European Convention on Human Rights 1950 (ECHR) as revised in 1998 by virtue of Protocol 11 of 1994 and Protocol 14; ii) Article 63 of the American Convention on Human Rights 1969 (ACHR); and Article 44 of the African Charter on Human and Peoples' Rights 1981 (ACHPR). However, procedural rights are subject to limitations. The European Court of Human Rights (ECtHR) "may only deal with the matter after all domestic remedies have been exhausted according to the general rules of international law and within a period of six months from the date on which the final decision was taken" (Article 35 (1) of the ECHR).

Once the ECtHR has adjudicated upon the alleged violation, the individual or group has no right to enforce or promote the enforcement of the decisions favourable to them. (Cassese, 2005) The successful individual or group is left in the hands

of the accused State and must depend on its goodwill. Theoretically, the Committee of Ministers, composed of the 47 Council of Europe Members and, in practice, their Permanent Representatives in Strasbourg, supervise the execution of the ECtHR's judgment. (Wouters et al., 2019)

Like the European Court of Human Rights, the enforcement of decisions of the African Court on Human and Peoples' Rights is left to the will of the accused State. Article 30 of the Protocol on the Statute of the African Court provides: "The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee execution." With regards to the Inter-American Court of Human Rights, a former Judge and President of the Court, Judge Antonio Augusto Cançado Trinidade, lamented:

> "In my opinion, the absence of a permanent political procedure for monitoring States' compliance with Court's judgments—similar to the one in operation within the Council of Europe—truly undermines the mechanism of collective guarantee underpinning the entire Inter-American human rights system…Sadly, there can be no enjoyment of rights enshrined when States do not effectively comply with the judgments issued against them by the Court. Human rights would be rendered illusory if States Parties could be free to refuse, or even delay, complying with the compulsory judgments of the Court …" (Trinidade & González-Salzberg, 2024)

It is obvious that the individual's or group's procedural right to apply to the three regional courts (European, African, and Inter-American) is precarious because its enforcement rests on the will of States.

5. Migration Options

Migration may be internal or international. Internal migration or internal displacement involves the movement of people—internally displaced people (IDPs)[31]—within their own countries. In international law, IDPs remain the responsibility of territorial States. In this section, we shall discuss international migration and the migration options of those who flee across international borders due to the adverse effects of climate change.

International migration is defined as "the act of moving across international boundaries from a country of origin (or country of emigration) to take up residence in a country of destination (or country of immigration). (Samers & Collyer, 2017) The 1951 Refugee Convention implicitly excludes those who are displaced across a state border due to the adverse effects of climate change. They do not qualify for refugee status even if we were to interpret the norms of International Human Rights Law liberally. However, various international migration options

[31]The Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('the Kampala Convention') defines internal displacement as "the involuntary or forced movements, evacuation or relocation of persons within internationally recognized state borders" (Article 1 (1)).

are available to states which are vulnerable to slow-onset and sudden-onset events. Options such as managed international migration, *in situ* adaptation, and international labour migration, coupled with the Climate Change Strategy and Action Plan, are discussed taking cognizance of the fact that international migration is multi-faceted, that is, it has legal, economic, and cultural dimensions.

One option is to manage international migration, that is, the signing of a bilateral agreement between the country of origin and the country of destination. Tuvalu, a series of low-lying atolls in the Pacific covering 1.3 million km^2, is among the nations at risk from rising seas. Prior to 2023, the approach of Tuvalu was to reject migration in favour of *in situ* adaptation based on the perception that climate change in the Pacific was slow-onset in nature and to permit interim measures until relocation was imperative. (McAdam, 2012a: p. 203) On 3 November 2023, Australia and Tuvalu signed a pact—The Australia-Tuvalu Climate and Migration Agreement (The Australia-Tuvalu Climate and Migration Agreement 2023)—whereby Australia offered refuge to citizens of Tuvalu because of the catastrophic impacts of climate change. Up to 280 Tuvaluans will be granted visas which will allow them to live, work, and study in Australia. Tuvalu, a middle-income country with a GDP per capita of US$5335, has a youth unemployment rate of 20.6 per cent (2016 data). Australia, a high-income country with a GDP per capita of US$65,000, has one of the tightest labour markets in the OECD. Tuvaluans are already eligible for New Zealand's Pacific Access Category, which allocates permanent residency visas to 75 Tuvaluans per year on a ballot basis, and we are now witnessing the evolution of a new category of migrants, namely, 'climate change migrants'. The first Tuvaluan visa holders are expected to arrive in Australia later in 2025, but the question that remains is how well supported they will be.

Kiribati's option is a merit-based option that allows those who want to migrate to Australia and New Zealand to do so at the earliest opportunity. Islands like Kiribati (only 2 - 3 metres above sea level) are vulnerable to a rise in sea level.

While managed and merit-based options have their benefits, they bristle with legal, political, and cultural problems as highlighted in *Teitiota v New Zealand*. (UN Human Rights Committee, 2016) In this case, Ioane Teitiota (claimant) and family left their home in the small atoll of Tarawa, part of the Pacific nation of Kiribati, for New Zealand where they applied for refugee status on the basis that climate change had devastated Kiribati so much so that remaining there posed a risk to their lives. At first instance, the Immigration and Protection Tribunal in New Zealand rejected Teitiota's asylum claim as a refugee because Teitiota did not face a risk of being persecuted if he and his family were returned to Kiribati, a necessary proof for asylum. The decision was upheld by the High Court, the Court of Appeal, and the Supreme Court of New Zealand. Teitiota took his case to the Human Rights Committee (HRC) claiming that forcibly returning him to New Zealand violated his right to life under Article 6 of the International Covenant on Civil and Political Rights 1966.

While the HRC accepted Teitiota's evidence that sea-level rise is likely to render

Kiribati uninhabitable, it decided that his right to life had not been violated, but dissenting judges (Judges Sancin and Muhumuza) stated that protecting the right to life meant upholding the sanctity of life. Those who migrate to Australia and New Zealand on their own or pursuant to the Australia-Tuvalu pact are severed from their cultural roots.

Another migration option is that adopted by Bangladesh, a country subject to slow and sudden-onset events, which entail international labour migration from Bangladesh to the Gulf States, Malaysia, and North Africa, coupled with the Climate Change Strategy and Action Plan. (IOM, 2010) This option, like the managed Australia-Tuvalu pact, bristles with political problems in the countries of destination. As the number of 'climate change migrants' swells, what was originally a humanitarian response could be framed by right-wing parties in the countries of destination as a security issue. This was the case during the European refugee crisis of 2015-2016, when the bulk of the refugee crisis was managed by coalition governments, which were not only a feature of European democracy but also common in the Antipodes. Some parties in the countries of destination may treat climate change migrants compassionately, while others treat them as threats to their existence and the continuity of their civilization. (Kriesi et al., 2024)[32]

We must now focus our attention on disappearing states: statelessness, integration, and assimilation, when those fleeing from the adverse effects of climate change eventually settle in their countries of destination.

6. Disappearing States, Statelessness and Relocation

The term "disappearing states" is a shibboleth used in describing low-lying island states in the Pacific, such as Tuvalu, Kiribati, the Marshall Islands, and the Maldives, which could eventually be totally submerged as sea levels rise due to human-induced climate change. In 2006, the residents of Lohachara island in the Bay of Bengal were relocated to a nearby island, and in 2007, residents of Carteret Islands in Papua New Guinea were relocated to the nearby Bougainville Islands. These relocations were intra-state. Should any of the low-lying island states face the existential threat of being totally submerged by the rise in sea levels, the state becomes extinct, its people are deemed stateless, their legal status is unclear, and their *en masse* relocation bristles with legal, economic, political, and cultural problems.

The extant provisions of human rights law on statelessness are not promulgated to deal with climate-induced displacement and are ineffective. They are as follows:

1. *The Universal Declaration of Human Rights* 1948 (*UDHR*)

Article 15 of the UDHR provides: "1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of nationality nor denied the right to change nationality". The provisions of the UDHR are aspirational or hortatory. Article 15 provision is not a right in the Hohfeldian sense (Hohfeld, 1966) because there is no correlative duty on States Parties.

2. *The Convention Relating to Stateless Persons* 1954

[32]For a trenchant critique of the dynamics of the politicization of refugee crises in Europe.

Article 1 of the 1954 Convention defines a stateless person as "a person who is not considered as a national by any State under the operation of its law". The permanent disappearance of habitable territory, preceded by a lack of population and government, means the State no longer exists for the purposes of Article 1.

3. *The Convention on the Reduction of Statelessness* 1961

Article 8 (1) of the Convention provides that a Contracting State shall not deprive a person of his nationality if such deprivation will render him stateless. The object of this Article is to prevent the deprivation of nationality by law. Statelessness as a consequence of the submergence of island states as sea levels rise due to human-induced climate change is not within its scope.

4. *The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* 1990

The International Organisation of Migration (IOM) has proffered a definition of "environmental migrants" as:

> "persons or [a] group of persons who, for compelling reasons of sudden or progressive changes in their environment that adversely affect their lives or living conditions are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently or who move either within their own country or abroad." (IOM, 2008)

The 1990 Convention has not been extended to embrace environmental or climate change migrants.

The question is, how do we effectuate relocation in the event of near or total submergence of the island states? The simple answer is that there are three approaches: i) acquisition of title to and sovereignty over new territory by purchase and/or treaty of cession, ii) some form of federation with another state; and iii) the idea of 'deterritorialised states'.

i) *Acquisition of title to and sovereignty over new territory by purchase and/or treaty of cession*

Cession usually occurs through the transfer of territory from one sovereign to another, with the intention that sovereignty should pass within the framework of a peace treaty, or is also accomplished in other circumstances, such as the purchase of Alaska by the United States in 1867 from Russia for $7.2 million. (Shaw, 2014) This is the best solution. Like Alaska, sovereignty would transfer to the disappearing state, which would then relocate its population to the new territory. It is possible to find a country that will cede or sell a portion of its territory to another country, but it is difficult if part of the territory is rich in natural resources.

A variant of this approach is Indonesia's 'renting out' some of its 17,500 islands to 'climate change refugees'. (The Straits Times, 2009) In other words, the displaced peoples of island states would lose their sovereignty as tenants on rented Indonesian islands. In 1960, a more attractive offer of permanent residence and citizenship by the governments of Australia, New Zealand, and the United States was turned down by Nauruans because it would lead to the assimilation of Nau-

ruans into the metropolitan communities where they settled. (McAdam, 2012b; Samers & Collyer, 2017)[33]

ii) *Some form of federation with another state*

The population of a disappearing state could be physically relocated within the territory of the 'host' state, having state autonomy within a federal state. (Wheare, 1962)[34] At the domestic level, international human rights law (especially the internal right to self-determination (Cassese, 1998) will provide protections for the relocated population. The disappeared state ceases to have any further say in its former maritime zone, having purchased its relocation with its maritime zones.

iii) *The idea of 'deterritorialised states'*

Article 1 of the Montevideo Convention on the Rights and Duties of States 1933, provides:

> "The State as a person in international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States."

It has been suggested that although international law stipulates that a territory is a precondition of statehood, the concept of 'deterritorialised state' is neither new nor rejected. (Rayfuse, 2009) The oft-cited example is the Sovereign Military Order of Jerusalem, of Rhodes, and of Malta (SOM), which is an ancient religious order dedicated to the provision of medical services. Its Charter stated that "The Order is a subject of international law and exercises sovereign functions. In practice, its functions were limited and specific. In its long history, it exercised sovereignty over the islands of Rhodes (1310-1528) and Malta (1530-1798). The Order finally lost its territorial domains due to the cession of the islands by France to Britain by the Treaty of Peace of 1814. In other words, the Order was deterritorialised. Despite its loss of territorial domains, it continued to have a certain international personality: it exchanges envoys with or is recognised by more than eighty states and has observer status in the General Assembly. It is true that the Order was deterritorialised. The question, now as then, is whether the Order is an international legal personality. Cassese and Crawford rejected the idea that the Order is an international legal personality with full legal capacity in international law to be described as a "state" and, hence, a "subject" of international law. The Order was described by Cassese as having "a limited, almost evanescent, international capacity". (Cassese, 2005) For Crawford, 'the Order is not a State" (Crawford, 2007), and the Italian Court of Cassation in *Nanni v Pace and the Order of Malta*[35] held

[33]The term "assimilation" is defined as having three meanings: "immigrants adapt to or adopt cultural ideas of the dominant culture; immigrants achieve the same socio-economic status…; and immigrants develop a spatial pattern in terms of residence and employment that is indistinguishable from the dominant culture groups."

[34]Federalism is the division of powers in a state "so that general and regional governments are each within a sphere, co-ordinate and independent." Traditionally, there are three essential ingredients of federalism, viz., separateness and independence of each government, mutual non-interference and intergovernmental immunities and reasonable balance between all the units.

[35]13 March 1935, 8 ILR (at 1485).

that the Order had a limited capacity to act in international relations for the purpose of achieving goals proper to the Order. The idea of 'deterritorialised state' is an exercise in logic which offers no solution to the persistent and perplexing problems of 'climate change refugees' and their relocation.

To sum up, the acquisition of title to and sovereignty over new territory by purchase and/or treaty of cession are well recognised in international law, but the relocation of inhabitants of island states who are adversely affected by sea levels rise due to human-induced climate change bristles with legal, social, economic and political problems.

Responses of international law to climate change are haphazard. And yet, the ill effects of climate change raise issues of intra-generational and inter-generational obligations, thus making climate change a matter of global justice. A Climate Change Treaty underpinned by a monist-naturalist conception of global justice is not only feasible but also desirable.

7. A "Climate Change" Treaty and Global Justice

The debate on the feasibility and desirability of a climate change treaty focuses on definitional problems, multicausality and the political will to negotiate a new instrument, but ignores the jurisprudence of a 'climate change' treaty: the protection of present and future generations and the demands of global justice.

A working definition of 'climate change refugee' covering both slow and onset events is not an insurmountable problem. As a matter of fact, such definitions have been proffered. Essam El-Hinnawi defines "environmental refugees" as:

> "Those people who are forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or affected their quality of life [sic]. By "environmental disruption" in this definition, it means any physical, chemical, and/or biological changes in the ecosystem (or the resource base) that render it temporarily or permanently unsuitable to support human life." (El-Hinnawi, 1985)

Docherty and Giannini's definition of climate change refugee requires the following six elements to be met: "i) forced migration; ii) temporary or permanent relocation; iii) movement across borders; iv) disruption consistent with climate change; v) sudden or gradual environmental disruption; and vi) a "more likely than not "standard for human contribution to the disruption." (Docherty & Giannini, 2009; IOM, 2008)

An agreed-upon definition, linking human activities to climate change and stating to whom obligations laid out in the treaty apply, could be constructed.

The multicausality argument that it is difficult to isolate climate change as a primary 'cause' of movement across borders because "climate change displacement treaty would necessarily require a link to climate change" (McAdam, 2012a: pp. 196-197), is trite jurisprudence for two reasons. First, the Intergovernmental Panel on

Climate Change (IPCC) in their Fifth Assessment Report in 2013 stated that "global warming is unequivocal and that the likelihood that humanity is causing it is extremely likely, which meant 95-100 per cent certainty." (IPCC, 2013; Rothwell & Stephens, 2016)

Second, 'cause' is different from 'cause' in law or legal attribution, which is determined by the *sine qua non* test. Hart and Honoré, in their *magnum opus*, *Causation in the Law*, stated that where there is a set of jointly relevant conditions, a condition may be the causally relevant factor (the condition *sine qua non*) because it is required to complete the set. (Hart & Honoré, 2002) In other words, it is the proximate or substantial cause of a rise in sea levels and the subsequent displacement of the inhabitants of states afflicted.

The ill-effects of climate change raise issues of intragenerational and intergenerational obligations and the desirability of a climate change treaty as a matter of global justice. There are two pertinent questions: i) Do future generations have the right not to suffer from the ill-effects of climate change? ii) If so, can we extend the principles of justice at the domestic level to global justice?

i) *Future Generations and the Non-Identity Thesis*

A Climate Change Treaty raises the issue of global justice in two ways: (i) that the ill-effects of greenhouse gases of the past and present generations will be borne by future generations, and (ii) that part of the problems facing present and future generations arise because of policies of past generations and need to be fixed. The question is: Do future generations have rights? The answer to this question is in the affirmative, but there are objections that are surmountable.

The first objection by Derek Parfit is that the term "right" is inappropriate in any discourse on future people. (Parfit, 1987) The second objection by Parfit (1987) and Gosseries (2008, pp 464-474) is that the number of future people is unknown and rights involve quantitative dimensions in forms of budget calculation or natural resources. The first proposition is about causation: that present action may have an impact on the future. This makes it possible to have, in the Hohfeldian sense, a correlative duty to a right that will exist, but the reverse option, that an alleged duty to a right that did not exist in the past, is philosophically problematic. (Hohfeld, 1966) The second proposition is that the number of future people is unknown, and rights involve quantitative dimensions in the form of budget calculation or natural resources, which must be read conjunctively with the first. (Gosseries, 2008: pp 464-474) The two objections that it is inappropriate to ascribe rights to future people and the non-identity thesis are not insurmountable.

According to Caney, a person has a right to X when X is a fundamental interest and the interest is not suffering from the ill-effects of climate change. Caney maintains that if persons have a right not to suffer from the ill-effects of climate change, then the right should apply to those who are alive and those who will be born. (Caney, 2006) Another critique of the non-identity thesis is the parent-child model: that we are causally responsible for future generations in the same way that we care for our children, and, as co-owners of earth, Risse opines that the view that "all hu-

man beings have the same claim to original resources and spaces that cannot be constrained by reference to what others have accomplished applies to *all* human beings *regardless* of when they live." (Risse, 2012)

If, therefore, the identity of future persons does not undermine the principle- and interest-based arguments to intergenerational obligations, then the conceptions of justice applicable to present and future generations can be classified as principle-driven (Rawls), interest-based (Caney), and communitarian (Risse). To these conceptions of justice we now turn.

ii) *Intergenerational Obligations and Global Justice*

John Rawls, in *a Theory of Justice*, enunciated a principle-based theory of justice derived from the original position: a position of equality that corresponds to the traditional theory of social contract. The original position is a purely hypothetical situation characterised so as to lead to a conception of justice, that is, it is a counterfactual hypothesis. In this original position, two principles of justice as fairness are proffered:

> "First: Each person has an equal right to the most extensive scheme of equal liberties compatible with a similar scheme for all.
> Second: Social and economic equalities are to be arranged so that they are both a) reasonably expected to be to everyone's advantage and b) attached to positions and offices open to all" (the *difference principle*).

Rawls in *Political Liberalism* (Rawls, 1999a; Rawls, 1993) broached the problem of intergenerational justice. He argues that in order to establish fairness between generations, it is necessary to add to the two principles of justice as fairness instantiated above, another principle: the "principle of just savings". Since society is a system of co-operation between generations over time, Rawls avers that the principle of just savings is required and that this is the principle that members of any generation would adopt and would want in any other generation, past, present, or future to adopt. (Rawls, 1993)

iii) *A Conception of Justice Underpinning a Climate Change Treaty*

The question is: what is the conception of justice underpinning *a Climate Change Treaty* and its attendant environmental problems? One candidate for such a conception of global justice is John Rawls's *A Theory of Justice*, which was extrapolated from *The Law of Peoples*. (Rawls, 1999b) Rawls's theory of justice lacks a principle of environmental justice, and its difference principle lacks global reach. For these reasons, the Rawlsian paradigm is inapt for underpinning *a Climate Change Treaty*. A conception of justice underpinning a Climate Change Treaty must privilege, as one of the guiding principles, human dignity defined in Pope John Paul's Encyclical Letter *Centessimus Annus* as follows:

> "[B]efore the right which man acquires by his work, there exist rights which do not correspond to any work he performs but which flow from his essential dignity as a person." (Paul II, 1991)

The starting-point for articulating a conception of global justice privileged hu-

man dignity as a guiding principle in the Preamble of a *Climate Change Treaty*, is Hill's philosophy and anthropology of human dignity. In his polemical writings, Hill contends that we live in a world where interests are diverse and often conflicting, and human beings are worthy of respect "regardless of how their values differ and whether or not we disapprove of what they do." (Hill, 2000: pp. 81-82) He identifies four basic attitudes of human dignity in a multi-cultural world: i) that people in different cultures have different legal systems, interpersonal relationships, tastes and aspirations; ii) that people identify themselves and their projects in cultural contexts; iii) that there is a tendency toward ethnocentricity on cross-cultural issues, and iv) that cultures and sub-cultures are unequal. (Hill, 2000: p. 81)

Mindful of the four basic attributes of human dignity described by Hill, a monist-naturalist conception of global justice where norms of municipal law and international legal orders are not derived from the same *Grundnorm* (a basic norm) as in Kelsen's pure theory of law is proffered. (Kelsen, 1967) The norms of international law are subject to a communitarian conception of justice, privileging human dignity as one of its guiding principles. A communitarian conception of justice underpins natural law doctrines such as common ownership of the earth, common concern of humankind, and the principle of common interest discussed above.

v) *Is There a Political Will to Negotiate a New Instrument?*

The answer to this question is in the affirmative because a similar instrument, albeit regional and on international biomedical law and ethics, privileging human dignity as one of its guiding principles in its Preambles—the Council of Europe Convention on Human Rights and Biomedicine [ECHRB][36]—was negotiated and promulgated. It had a wide territorial application: non-EU countries (Australia, Canada, the Holy See, Japan, and the United States) took part in the ECHRB's preparation and may sign the treaty (see Article 35). Furthermore, humanitarian needs and geopolitical concerns that a Climate Change Treaty has the potential of preempting and managing refugee flows, and costs far less than dealing with regional conflicts or the en masse arrival of individuals adversely affected by climate change, might cause states to come to the table and ratify the treaty.

8. Conclusion

There is a broad international consensus that the emission of greenhouse gases caused by human activities is responsible for climate change and that the ill-effects of climate change are droughts in the Sahel region of West Africa and elsewhere, persistent flooding in Bangladesh and rise in sea levels likely to result in the submergence of island states such as Tuvalu, Kiribati, the Marshall Islands and the Maldive Islands and which force those affected by these catastrophes, described as

[36]The Council of Europe Convention for the Protection of Human Rights and Dignity of Human Beings with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. https://www.coe.int

'climate change refugees', to flee across borders. Climate change refugees are not protected by the 1951 Refugee Convention and its 1967 Protocol because "climate change" and "environment" are not recognised as accepted grounds under the Convention.

Several suggestions have been proffered for protecting 'climate change refugees' under international law from extending the definition of refugee under the 1951 Refugee Convention to international human rights law as a complementary protection for climate change; protection under environmental law; migration options; adding a Protocol to the United Nations Framework Convention on Climate Change (UNFCCC); and promulgating a 'stand alone' Climate Change Treaty.

The problem with extending the 1951 Refugee Convention to 'climate change refugees' is that the International Refugee Law is a cumbersome framework for addressing flight from climate-related impacts. The protection of 'climate change refugees' under international human rights law and environmental law bristles with practical problems. Individuals or groups are 'objects' of international law. The sole 'subjects' of international law are states because, as "international legal persons," they have the full capacity to institute proceedings in international tribunals, which includes the right to enforce and promote the enforcement of the decisions. Where individuals or groups are given procedural right to initiate proceedings before an international body such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Justice and Human Rights, the rules maintain their character as law among sovereign entities because individuals or groups have no right to enforce or promote the enforcement of decisions favourable to them. The successful individuals or groups must depend on State's goodwill for, or cessation of, the wrongful act, in which case, the individuals or groups lack full capacity to be 'subjects' of international law.

The migration options, while attractive, bristle with legal, political, and cultural (e.g., assimilation) problems discussed above. Adding a Protocol to the UNFCCC 1992 is not new. As a matter of fact, the Kyoto Protocol was added in 1997. The problem with instruments of global climate change regime is that neither the UNFCCC 1992 nor the Kyoto Protocol 1997 included any provisions for those who are directly affected by climate change, and what is more, the Copenhagen Accord 2009 is not legally binding and fails to provide a "binding" commitment on the mitigation of climate change. We are left with a 'stand alone' Climate Change Treaty.

A Climate Change Treaty is desirable because the adverse effects of climate change raise profound issues of global justice, discussed above, which require a new instrument with global reach that creates a Coordinating Agency to support the implementation of its provisions and an International Court with jurisdiction over issues related to climate change refugees. A Climate Change Treaty is feasible because we already have an outline of such a treaty[37], which can be adapted *mutatis mutandis*.

[37]See Bonnie Docherty and Tyler Giannini, op cit, pp. 349, 361-403.

Finally, the political will manifested by five non-EU states in promulgating the Council of Europe Convention on Human Rights and Biomedicine—privileging human dignity[38] as one of its guiding principles and a paradigm and an interrogatory source for a Climate Change Treaty—is not a passing fashion but portends a wave of the future.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

Arboleda, E. (1995). The Cartagena Declaration of 1984 and Its Similarities to the 1969 OAU Convention—A Comparative Perspective. *International Journal of Refugee Law, 7,* 87-101. https://doi.org/10.1093/reflaw/7.special_issue.87

Caney, S. (2006). Cosmopolitan Justice, Rights and Global Climate Change. *The Canadian Journal of Law and Jurisprudence, 19,* 255-278. https://doi.org/10.1017/s0841820900004100

Carling, J. (2023). The Phrase "Refugees and Migrants" Undermines Analysis, Policy and Protection. *International Migration, 61,* 399-403. https://doi.org/10.1111/imig.13147

Cassese, A. (1998). *Self-Determination of Peoples: A Legal Appraisal*. Cambridge University Press.

Cassese, A. (2005). *International Law* (2nd ed.). Oxford University Press.

Chapman, A. (2012). *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th ed.). Oxford University Press.

Crawford, J. (2012). *Brownlie's Principles of Public International Law* (9th ed.). Oxford University Press. https://doi.org/10.1093/her/9780199699698.001.0001

Crawford, J. R. (2007). *The Creation of States in International Law*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199228423.001.0001

Docherty, B., & Giannini, T. (2009). Confronting the Rising Tide: A Proposal for a Convention on Climate Change Refugees. *Harvard Environmental Law Review, 33,* 349-403.

Edwards, A. (2016). Refugee Status Determination in Africa. *African Journal of International and Comparative Law, 14,* 204-233. https://doi.org/10.3366/ajicl.2006.14.2.204

El-Hinnawi, E. (1985). *Environmental Refugees*. UNEP.

Gosseries, A. (2008). On Future Generations' Future Rights. *Journal of Political Philosophy, 16,* 446-474. https://doi.org/10.1111/j.1467-9760.2008.00323.x

Hanning, M. (1996). An Examination of the Possibility of Secure Intellectual Property Rights for Plant Genetic Resources Developed by Indigenous Peoples of NAFTA States: Domestic Legislation Under the International Convention for Protection of New Plant Varieties. *Arizona Journal of International and Comparative Law, 13,* 175-252.

Hart, H. L. A., & Honoré, T. (2002). *Causation in the Law*. Clarendon Press.

Hill, T. E. (2000). *Respect, Pluralism and Justice*. Oxford University Press. https://doi.org/10.1093/0198238347.001.0001

Hohfeld, W. N. (1966). *Fundamental Legal Conceptions as Applied in Judicial Reasoning*.

[38]See Article 1 of the Universal Declaration of Human Rights 1948 which provides that "All human beings are born free and equal in dignity and rights. They are endowed with reason and should act towards one another in a spirit of brotherhood."

Yale University Press.

IOM (2008). Migration and Climate Change. International Organization on Migration.

IOM (2010). *International Organization for Migration Assessing the Evidence: Environmental Climate Change, and Migration in Bangladesh*. IOM.

IPCC (1990). *Intergovernmental Panel on Climate Change. Climate Change* (3 Vols.). Cambridge University Press.

IPCC (2013). *Intergovernmental Panel on Climate Change. The Physical Science Basis*. Cambridge University Press.

Johns, F. (2010). *International Legal Personality*. Ashgate.

Joseph, S. et al. (2005). *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed.). Oxford University Press.

Kelsen, H. (1967). *The Pure Theory of Law* (Trans. Max Knight). University of California.

Korowicz, M. S. (1956). The Problem of the International Personality of Individuals. *American Journal of International Law, 50,* 533-562. https://doi.org/10.2307/2195506

Kriesi, H., Altiparmakis, A., Bojár, Á., & Oană, I. (2024). *Coming to Terms with the European Refugee Crisis*. Cambridge University Press. https://doi.org/10.1017/9781009456555

Lauterpacht, H. (1947). The Subjects of the Law of Nations. *Law Quarterly Review, 63,* 438-460.

Lauterpacht, H. (1948). The Subjects of the Law of Nations. *Law Quarterly Review, 64,* 97-119.

McAdam, J. (2011). Swimming against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer. *International Journal of Refugee Law, 23,* 2-27. https://doi.org/10.1093/ijrl/eeq045

McAdam, J. (2012a). *Climate Change, Forced Migration, and International Law*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199587087.001.0001

McAdam, J. (2012b). Disappearing States, Statelessness and the Boundaries of Internation-al Law. In J. McAdam (Ed.), *Climate Change and Displacement Multidisciplinary Perspectives* (pp.105-129). Oxford. Oxford University Press.

Morley, D., & Chen, K. (1996). *Stuart Hall: Critical Dialogues in Cultural Studies*. Routledge.

Nicolosi, S. F. (2014). The African Union System of Refugee Protection: A Champion, Not a Recipient. *International Organizations Law Review, 11,* 318-344. https://doi.org/10.1163/15723747-01102004

Osóbka, P. (2021). Climate Change and the Convention Relating to the Status of Refugees of 28 July 1951. *Polish Review of International and European Law, 10,* 103-120. https://doi.org/10.21697/priel.2021.10.1.04

Parfit, D. (1987). *Reasons and Persons*. Clarendon Press.

Parlett, K. (2008). The PCIJ's Opinion in Jurisdiction of the Courts of Danzig. Individual Rights under Treaties. *Journal of the History of International Law, 10,* 119-145. https://doi.org/10.1163/157180508x320163

Paul II, J. (Pope) (1991). *Centessimus Annus*. Catholic Truth Society.

Peters, A. (2016). *Beyond Human Rights: The Legal Status of the Individual in International Law*. Cambridge University Press. https://doi.org/10.1017/cbo9781316687123

Phillimore, R. (1879). *Commentaries upon International Law* (3rd ed., Vol. 1). Butterworths.

Pratt, L. V. (1988). Cultural Rights as Peoples' Rights. In J. Crawford (Ed.), *The Rights of Peoples*. Clarendon Press.

Rawls, J. (1993). *Political Liberalism*. Columbia University Press.

Rawls, J. (1999a). *A Theory of Justice*. Oxford University Press.

Rawls, J. (1999b). *The Law of Peoples*. Harvard University Press.

Rayfuse, R. G. (2009). *W(h)ither Tuvalu? International Law and Disappearance of States*. University of New South Wales Faculty of Law Series, Working Paper No. 2009-9.

Risse, M. (2012). *On Global Justice*. Princeton University Press.

Rothwell, D. R., & Stephens, T. (2016). *The International Law of the Sea* (pp. 42-43). Hart Publishing.

Samers, M., & Collyer, M. (2017). *Migration* (2nd ed.). Routledge.

Sands, P., & Peel, J. (2012). *Principles of International Environmental Law* (3rd ed.). Cambridge University Press.

Schwarzenberger, G. (1957). *International Law* (Vol. 1). Stevens.

Shaw, M. N. (2014). *International Law* (7th ed.). Cambridge University Press.

The Straits Times (2009). Indonesian Islands for Rent.

Trindade, A. A. C. (2010). *International Law for Humankind towards a New Jus Gentium*. Martinus Nijhoff Publishers.

Trindade, A. A. C., & González-Salzberg, D. A. (2024). *International Law of Human Rights*. Oxford University Press.

UN Human Rights Committee (2016). *View Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No.2728/2016: Human Rights*. Committee CCPR/C/127/D/2728/2016. https://digitallibrary.un.org/record/3979204?v=pdf#files

WCED (2005). *World Commission on Environment and Development. Our Common Future*. Oxford University Press.

Wheare, K. C. (1963). *Federal Government* (4th ed., pp. 25-26). Oxford University Press.

Wouters, J. et al. (2019). *International Law, a European Perspective*. Hart Publishing.

Xanthaki, A. (2007). *Indigenous Rights and United Nations Standards*. Cambridge University Press. https://doi.org/10.1017/cbo9780511494468