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Climate Refugees in International Law

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Abstract

Displacements caused by climate-related events have been on the rise throughout the last decades. The effects of climate change in displacement of people is still a field in construction. The people displaced due to the environment were first denominated as “climate refugees” or “environmental refugees”. This thesis aims to examine the protection of the so-called “climate refugee” under international law. The main issue of the thesis relies on the fact that there is no general agreement on the refugee status of the “climate refugees”. The refugee regime has the 1951 Convention as its cornerstone, and as such, the analysis of the Convention is crucial to comprehend who can be a refugee. The 1951 Convention is not the only legal instrument in the refugee regime. There are other legal documents capable of guaranteeing protection for refugees. This thesis discusses two other relevant legal instruments dealing with refugee protection: the OAU Convention and the Cartagena Declaration. It analyzes the refugee definitions and the main features of these specific documents. The three documents will be used to establish what sort of protection the “climate refugees” are entitled to under international law. The thesis will use two judicial decisions to evaluate the hypothesis of “climate refugee” being considered as a refugee in these legal documents. It concludes that there is a gap in the legal protection of people displaced by environmental causes. This legal void might change with the influence of international institutions which can enhance the adaptation of the refugee regime to the new demands of society.

Keywords

Climate Refugees, 1951 Convention, OAU Convention, Cartagena Declaration, International Organizations, Refugee Regime

Length of the thesis: 73 pages, 182.194 characters

Declaration

1. The author hereby declares that he compiled this thesis independently, using only the listed resources and literature.

2. The author hereby declares that all the sources and literature used have been properly cited.

3. The author hereby declares that the thesis has not been used to obtain a different or the same degree.

In Prague on 06 May 2019 Natália de Figueiredo Coelho Maciel

Acknowledgement

Writing a thesis is not an easy path, but some people made it easier. First, I would like to thank my supervisor, Milan. He brought the topic of climate refugees to one of our international law classes, and he showed me how interesting this topic could be. He also helped me all the way through the final steps. I really appreciate all your help during this process. Second, I would like to thank my dear husband and my family for all the support during those years of study. Finally, I would also like to thank Mr. Jan Karlas and Mr. Michal Parízek for making this master programme so interesting to the students. You were always very kind and helpful to me during the whole programme. I hope that you all can appreciate the reading as much I enjoyed learning about this topic.

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Introduction

According to the International Organization for Migration, the migrant can be defined as "any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is."[1] As one can observe, the classification of migrant can vary depending on a particular situation. The purpose of this thesis is to discuss a specific type: climate migrants.

My thesis will address the topic of the so-called climate refugees. Climate change is one of the main concerns in the international community. Throughout the last decades, various natural disasters have occurred in the world. Droughts, floods, "disappearing states" and the rising of the sea level are just some of the examples of the devastating effects of climate change in the world. As we can observe, the effects of climate change can be rapid and inevitable like earthquakes, or it can be gradual, as in the case of disappearing states. Despite these facts, the only thing which is certain is that all these events might interfere in people's life by forcing the population to migrate to other areas.

In the last decades, different documents have been created as an attempt to provide legal protection for refugees, for instance the Cartagena Declaration and the Africa Refugee Convention. However, "climate refugees" fail to be granted international law protection as it is defined in the UN Refugee Status Convention (1951) and other legal instruments. For that reason, there is considerable discussion among scholars and the international community regarding the so-called "climate refugees" - the distinction between migrants, refugee, asylum seeker will be discussed at length in the thesis.

Are these environmental migrants entitled to refugee protection under international law? My research will analyze the application of international law in the particular case of climate refugees. This subject is of the utmost importance, since from only January to June 2017, 4.5 million people were displaced due to environmental disasters[2]. Therefore, my goal is to study in-depth the possibility of applying the refugee status to these climate migrants.

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1 International Organization for Migration, Available at: https://www.iom.int/who-is-a-migrant
2 Internal Displacement Monitoring Centre. Available at: http://www.internal-displacement.org/assets/publications/2017/20170816-mid-year-figures-highlights.pdf.

Operationalization

I will start my thesis by providing a general background about refugees, the appearance of the term, and how the refugees came under international law protection. Also, I will explore what are the requisites required by law to define a person as refugee. In the third chapter, I intend to explain some aspects that I consider important in order to have a broad understanding of climate refugees. First, I will provide a historical background about the emergence of the term "climate refugees". Then, I will show the difference between internally displaced person and externally displaced people, since these two types of migrants have fundamental differences and cannot be confused. Finally, I will explain the several definitions existing to conceptualize a climate refugee.

In the fourth chapter I will present some examples of international legal instruments available for grating protection to refugees. I will briefly highlight the most important positive and negative aspects of the 1951 Refugee Treaty, the African Refugee Convention and the Cartagena declaration. The purpose of this segment is to analyze the possibilities of refugee protection under international law.

The fifth chapter will be dedicated to scrutinize the Tuvalu case in front of New Zealand's Immigration and Protection Tribunal. This represents an important judicial decision regarding claims made by climate refugees. After a general overview of the case, I will analyze the case according to international law and present summary of my findings. The analysis will be based exclusively on the treaty regarding the refugee and its protocols.

The sixth chapter will proceed exactly like the previous one. However, in this case I will analyze the Kiribati case in front of New Zealand's Immigration and Protection Tribunal, a similar case to the first one, but with a different outcome.

Finally, the last chapter will summarize the conclusions of the thesis.

Data and case selection:

I will rely on different sources in my analysis. As primary source I will resort to the Convention on the Status of Refugee and its protocols, research institute reports, published books, published articles and judicial decisions. As secondary source I will use reports from non-governmental organizations, articles published in the media and doctrine of international law.

Case selection

I decided to select two judicial decisions with different outcomes. The first case concerns a Tuvalu citizen that applied for a "climate" refugee visa for New Zealand. In this case, the visa was granted. Therefore, I want to analyze the reasons behind the decision and if they can be considered

a climate refugee according to international law. The other case is from a citizen from Kiribati who also claimed climate change reasons for his application of refugee, but this was denied by the competent authorities.

Outline

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List of Abbreviations

EEM: external environmental migrant

GPID: Guiding Principles on Internal Displacement

ICCPR: International Covenant on Civil and Political Rights

ICESC: International Covenant on Economic, Social and Cultural Rights

IDMC: Internal Displacement Monitoring Centre

IDP: Internally Displaced Persons

IGO: International governmental organizations

INGO: International non-governmental organization

IOM: International Organization for Migration

OAU: Organization of African Unity

UN: United Nations

UDHR: Universal Declaration of Human Rights

UNFCC: United Nations Framework Convention on Climate Change

UNHCR: United Nations High Commissioner for Refugees

Introduction

From 2008 to 2016, there were 227 million people displaced due to weather-related hazards, according to the Internal Displacement Monitoring Centre.[3] Sudden-onset natural hazards caused the displacement of 24.2 million people in 118 countries in 2016 alone.[4] This number depicts only part of the problem of displacement caused by climate-related events, since the IDMC does not include in their data analysis the displacement caused by slow-onset disasters like droughts and environmental degradation, for instance. However, researches suggest that the effects of climate change will impact the frequency and intensity of weather events and environmental degradation, which will likely increase displacements.[5] The actual total number of people displaced by climate-related events is still inaccurate as there is no agreement regarding the extent of the effects of climate change on forced migration.

Some scholars created new terminology to address people in this particularly worrying situation. They were initially denominated as "climate refugees" or "environmental refugees". Even when this term became popular throughout the years, most scholars and international institutions do not consider this term adequate to refer to this sort of displaced people. The main concern about this terminology is that it implies that these people displaced by climate-related events would be entitled to refugee protection under the 1951 Convention. In other words, these people would be protected under the refugee law regime, and this is not a common understanding within the international community.

The plight of the so-called "climate refugees" was already recognized by international organizations, such as the International Organization for Migration and the United Nations High Commissioner for Refugees. Nevertheless, the UNCHR does not recognize the status of refugee for people displaced across borders due to climate change. The IOM also does not understand that these people are refugees, so they use different terminology to define those who are usually called "climate refugees".

Despite the evidence of displacement caused by the effects of climate change throughout the world, tribunals, states and international institutions have difficulties in acknowledging the refugee status of these people. They claim the inapplicability of the 1951 Convention for the cases of displacement caused by climate change. In this case, what instrument of international law could grant adequate protection to these displaced people?

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3 Internal Displacement Monitoring Centre, 2017. Global Report on Internal Displacement. Available at http://www.internal-displacement.org/global-report/grid2017/. [Accessed 22 March 2018].
4 *Ibid*, Part 1 On the Grid Internal Displacement in 2016, at 31.
5 Internal Displacement Monitoring Centre, Part 1 On the Grid Internal Displacement in 2016, at 11.

There is a gap in international law in conferring adequate legal protection to people displaced by the effects of climate change. There is no sole binding instrument of international law covering this topic, nor an international governmental organization dealing with this specific issue-area.

International institutions have already proven their central role in the evolution process of granting legal protection to refugees and migrants. The refugee law evolved since the emergence of the 1951 Convention, and international organs such as the United Nations High Commissioner for Refugees were crucial to guaranteeing the rights of the refugees.

The present thesis intends to discuss the existing international law protection to people displaced by climate change-related events.

I will answer the following hypothesis questions:

1. Can "climate refugees" be considered as refugees according to the 1951 Convention?
2. Can "climate refugees" be considered as refugees according to the OAU Convention?
3. Can "climate refugees" be considered as refugees according to the Cartagena Declaration?

This thesis will resort to three legal instruments as primary sources: the 1951 Convention[6], the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[7] and the Cartagena Declaration on Refugees.[8] To understand the content of these documents, I will explore reports, books and journal articles that discuss the nuances of these instruments. These sources are essential to fully understand the historical context of the creation of these legal documents and to analyze in-depth the possible interpretations of the terms used in the description of refugee, for instance.

The first chapter will start by explaining the background history for the creation of the 1951 Refugee Convention. The most relevant aspects of the Convention will be addressed. It will describe the first definitions used to conceptualize a refugee until the current and accepted definition stated in the 1951 Convention. Afterward, I will analyze some main terms used in the refugee definition of the 1951 Convention that I consider crucial to the development of the present thesis.

The second chapter will focus on the aspects of the so-called "climate refugees". When did this term first appear? Why are they described like that? It will analyze the criticisms of the

6 UN General Assembly, Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.
7 Organization of African Unity, Convention Governing the Specific Aspects of Refugees Problems in Africa, 1001 U.N.T.S. 45, entered into force June 20, 1974.
8 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984.

expression “climate refugee” and “environmental refugee”, and how this term differentiates from an internally displaced person, an externally displaced person and a refugee.

The third chapter aims to go deeply into the other two legal instruments that will be used in this work: the OAU Convention and the Cartagena Declaration on Refugees. The historical context of the emergence of these instruments will also be emphasized. The relevance of analyzing these two instruments relies on their refugee definitions. Even though the 1951 Convention remains the main landmark in refugee law, these new legal documents cast a different light on needed changes in certain aspects of the Refugee Convention. The refugee definition is the core aspect of these documents. The thorough analysis of the terms and the general ideas of the different definitions are the foundation for the investigation of this work.

After providing a conceptual framework of the refugee regime, the fourth and fifth chapters will focus on two different important cases from the New Zealand Tribunal. The analyses of these cases according to the three instruments of international law is the methodology used to answer the formulated hypotheses questions. The individual features of these cases will be scrutinized in these chapters. At first will be an overview of the main facts and arguments used by the lawyers of these cases. After that, it will assess if there is any possibility of each one of these cases to fit into the refugee definitions of one of the three instruments scrutinized. Finally, at the end of the fifth chapter, I will evaluate the possible role of international institutions in solving the problem of the gap in the protection of the so-called “climate refugees”.

The conceptual framework of this thesis will focus mainly on refugee law. However, as human rights law is intimately entwined with refugee law, it will also be mentioned in this work. Besides that, the aspects of international regimes and organizations will also be included in the framework of this thesis as they represent essential instruments of international relations capable of tackling with the problem of “climate refugees”.

Chapter One: Convention and Protocol Relating to the Status of Refugees

Refugee and displaced persons are not a new phenomenon to society. Throughout history, forced migration of people has been a constant problem for states. However, the issue of refugees has always been considered a problem of sovereignty that only concerned those states receiving the refugees. It was only in the last century that the international community realized that this problem should be addressed as a common issue.

During the first half of the 20th century, the world suffered profound changes with long-lasting empires falling apart and the dismantlement of monarchies all over Europe. The chaos that Europe was in for so many years had as one of the side effects a serious problem with forced migrants. Even though fleeing migrants were not a new problem, there was no unique legal instrument to guarantee their protection.

Several organizations, such as the League of Nations and the International Refugee Organization, attempted to tackle the issue of persecuted people throughout these first decades of the last century. Yet, it was only with the foundation of the United Nations in 1945 that this question was thoroughly addressed by the international community. In the aftermath of the Second World War, the recently-founded United Nations manifested their serious concern about the fundamental rights of refugees. As a consequence, in a common effort by the member states in 1951 during a United Nations Conference in Geneva, several countries adopted the Convention relating to the Status of Refugees[9], widely known as the 1951 Convention, a legal instrument guaranteeing the protection of refugees. The Convention entered into force on 22 April 1954. The 1951 Convention is the "primary source of refugee-specific rights in international law"[10], and, as such, the base of refugee law regime.

As Europe was embedded in a severe refugee crisis after the end of the Second World War, the Convention limited its full scope for events occurring before 1 January 1951. According to this document, the States Parties should choose between two interpretations of the words "events occurring before 1 January 1951". The first one constricted the extent of the application of the Convention to facts that took place only in Europe. The second one encompassed events occurring in Europe and elsewhere. States should declare their choice at the time of signature, ratification or accession according to what was described in the document.

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9 Convention relating to the Status of Refugees, *supra* note 6.
10 Hathaway, James C., 2005, *The Rights of Refugees under International Law*, Cambridge University Press, p. 75.

The geographical and temporal limitations were a necessary strategy adopted by the United Nations to guarantee a higher number of member states, as they were resistant "to sign a 'blank cheque' for unknown numbers of future refugees".[11] This was an important step in transforming the Convention into a wider international and binding instrument that addressed the rights and duties of refugees.

As Europe was overcoming this crisis and similar situations arose throughout the world, the need for modifying the 1951 Convention became imperative. In December 1966, the General Assembly adopted a Protocol relating to the Status of Refugees amending the 1951 Convention to remove the temporal and the geographical limitations.[12] This amendment is known as the 1967 Protocol. This Protocol was the last time that the Convention was altered. This modification was important in order to allow the application of the Convention and its Protocol beyond European boundaries. For that reason, these legal instruments are considered a milestone in guaranteeing the rights of the refugees at an international level.

The Convention is an extremely relevant tool in conferring protection to the refugees spread worldwide. This document is not limited to defining the term refugee, but it also addresses the scope of rights of those entitled to the status of a refugee. Education, freedom of movement, social security, and the principle of non-discrimination are just some of the rights covered by this document.

Among such an extensive list of rights, an important norm was elaborated in order to ensure that refugees would not be returned to the countries they were fleeing from. Article 33 of the Convention predicts the principle of *non-refoulement*, which determines that the State Parties should not expel or return a refugee to the place from where he or she escaped. However, are all states, even when not signatories of the treaty, obliged to follow that norm? The principle of *non-refoulement* is a customary international law[13], and as such, States are obligated to conform with this international custom even when not parties to the treaty.

Some scholars claim that the principle of *non-refoulement* acquired the status of *jus cogens* with the consolidation of state practice throughout the decades. Norms of *jus cogens* do not admit deviation; they are "higher norms of which no violation is allowed. In no circumstance may a State legally transgress the norms of *jus cogens,* for they are considered norms so essential to the

11 Goodwin-Gill, Guy S., 2014, *The International Law of Refugee Protection*, In The Oxford Handbook of Refugee and Forced Migration Studies, Oxford Handbooks Online, Available at: http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021.
12 UN General Assembly, Protocol relating to the Status of Refugees, 16 December 1966, A/RES/2198.
13 Goodwin-Gill, *supra* note 11, at 5.

international system that their breach places the very existence of that in question".14 This principle is also present in international human rights treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Consistent with the principles of international law, states are legally obliged to conform with the principle of *non-refoulement* due to *jus cogens*. Some states have supported the recognition of *non-refoulement* as a rule of *jus cogens*. The main example is that States parties of the Cartagena Declaration reiterate the importance of this principle and the imperative need to recognize non-refoulement as a *jus cogens* norm. However, this position is still controversial and not a consensus in the international community.

The *non-refoulement* is at the core of the 1951 Convention. Its relevance to international law has been reiterated and addressed by organs such as the United Nations High Commissioner for Refugees, the organ responsible to "defend" the 1951 Convention and its 1967 Protocol by cooperating with States to safeguard the rights of refugees. In 2001, in a joint declaration, the States parties of the 1951 Convention and its Protocol acknowledged the central value of the principle of *non-refoulement* to the international regime and its widely recognized status of customary international law.[15]

Until now, the Convention and Protocol Relating to the Status of Refugees are the main universal legal document in the refugee law regime. This instrument is widely adopted by states, and it has been used as an inspiration to the adoption of new rules of domestic law in several countries. As a document envisioned decades ago, in a totally different historical context, the Convention has been pointed out as failing to address some problems concerning refugees.

The universal document has several important articles worth being studied; nevertheless, the concept used to define the term "refugee" is the most relevant part of this thesis. The definition of refugee is crucial to define the 1951 Convention's scope of application, and for that reason, this limited definition of refugee has always been the object of critics. As the world observed the emergence of new forms of refugees, states failed to grant refugee status to some forced migrants on account of the norms of international law. According to the rules of refugee law, those people are not entitled to protection due to the restrictions established by the definition of the term "refugee". Therefore, a thorough analysis of the evolution and the tenets of the term refugee is necessary to understand the implications of this terminology.

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14 Allain, Jean, 2001, *The Jus Cogens Nature of Non-Refoulement*, International Journal of Refugee Law, vol.13, pp. 533-558, ISSN 095-8I 86, p. 535.

15 Ministerial Meeting of States Parties, 2001, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugee. Available at: http://www.unhcr.org/419c74d64.pdf [Accessed 25 July 2018].

1.1 Evolution of the refugee definition and main requirements under the 1951 Convention

The rapid changes that occurred in the world, and especially in Europe in the turbulent period post Second World War, compelled the international community to address the problem of refugees seriously. Throughout the years, instruments were created as an attempt to provide a legal framework to guarantee refugee protection. The definitions of the term "refugee" constantly changed as they were elaborated according to the "temporary" refugee problem. Initially, these instruments were concerned with conferring protection to specific types of peoples.

The Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees of 12 May 1926 was one of the first documents to adopt a definition for the term refugee. According to this document, any person of Russian origin who did not want the protection of the Soviet Regime or any individual of Armenian origin who after the dismantling of the Ottoman Empire did not want to be ruled by the Turkish government must be considered a refugee.[16] In 1939, the Austrian nationals fleeing after the unification of territories of the Former Republic of Austria and the German Reich were also considered refugees according to a Protocol signed under the auspices of the League of Nations. One can observe that the concept of the term "refugee" changed and adapted itself to the refugee problem of that time, as there was no general description to encompass all kinds of refugees.

It was only in 1946, in the aftermath of the Second World War, that the definition was modified and became broader. The first instrument that attempted to conceive a more general definition was the Constitution of the International Refugee Organization. The Constitution divided the circumstances under which a person could be considered as a refugee into three categories. Among these categories, two were related to the historical-political moment of the post-war period, and the third one was concerned with refugees that emerged before the war. In addition, there was one general requirement that was common to all refugees[17].

The first and second categories aimed to guarantee protection to those people fleeing Nazi or fascist regimes and other specific fascist regimes spread across Europe. The third category and the general requirement were innovative measures that confirm the evolution of refugee's definition since these features were designed to reach beyond only post-war refugees. The third category

16 League of Nations, *Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees*, 12 May 1926, League of Nations, Treaty Series Vol. LXXXIX, No. 2004, available at: http://www.refworld.org/docid/3dd8b5802.html [Accessed 21 March 2018].
17 Constitution of the International Refugee Organization,1946, entered into force 20 August 1948, 18 U.N.T.S p.3, Annex I, Part I, Section A.

conferred protection for persons who were already considered refugees before the Second World War, for reason of race, religion or political opinion. As the Constitution asserted, the common precondition, applicable to all people, was that the person must be outside the country of nationality or habitual residence in order to be considered a refugee. As can be observed, the Constitution created some of the main features that would be used in the upcoming 1951 Convention to define the term refugee.

As mentioned before, the conceptualization of the term suffered several changes from when the first document addressing the refugee issue entered into force. The ultimate definition was established by the General Assembly with the approval of the Convention Relating to the Status of Refugees in 1951. Differently from previous definitions, the Convention attempted to establish a general term to conceptualize refugee without limiting it to specific peoples as happened in the past.

Article A of the 1951 Convention defines refugee. The first part of the article A alludes to the definition of refugee used by those previous international agreements. The intention was to guarantee that those considered refugees under former instruments would continue to be protected under the new 1951 Convention.[18]

However, the general and most important definition is in the second part of the article 1. The A(2) article defines refugee as someone that "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality an 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; 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".[19] The document clearly states the main requirements necessary for a person to be considered as a refugee.

Yet, not everyone is entitled to refugee protection. According to the Convention, some people cannot be considered as refugees. This is in the case of people who have committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside the country of refuge. Also, if a person has been considered guilty of acts that are against the purpose

18 UNHCR, 2011, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV.3 p.10, para. 33.
19 Convention relating to the Status of Refugees, *supra* note 6.

and principles of the United Nations, he or she is not able to receive refugee protection. These are the cases of exclusion of protection under refugee law.[20]

Besides, not everyone can fit under the status of refugee. The interpretation of the terms used in the definition is pivotal to comprehend who can be considered a refugee under the 1951 Convention. For this reason, a thorough analysis of some of the main terms will follow to further the understanding of the refugee definition and its possible interpretations.

a) Well-founded fear

The "well-founded fear of being persecuted" is a key phrase to understanding the whole concept of a refugee under the Convention. In previous documents used to define refugee (i.e. the League of Nations Treaty on Russian and Armenian Refugees), the idea was to include a certain group under the definition. In those cases, the refugee only needed to be a Russian or Armenian national, for instance, to receive protection. No further requirements were needed to grant refugee status to these groups. However, the 1951 Convention aimed to emphasize the claim based on individual reason, hence the presence of a subjective and an objective element. However, claims based on "group determination" might occur under extremely urgent circumstances.[21]

The term "fear" is the subjective criteria. In this case, the State must consider the state of mind of the individual which is heavily influenced by several factors such as personal and familiar background, religion, political inclinations, race, and membership to a social group.[22] All these factors must be taken into consideration when analyzing the application of a person based on "fear" of persecution. However, claims hinging only on the subjective criteria are not enough to recognize a person as a refugee because some people might overestimate their fears. The fear must be reasonable.

The objective criteria must also be present. The objective element relies on the fact that the fear must be "well-founded". The State is responsible for the personal assessment of the refugee claim by analyzing the personal and family background, wealth, influence, among other factors.[23]

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20 Convention relating to the Status of Refugees, supra note 6, Article I, F.
21 UNHCR, *supra* note 18, paragraph 44.
22 Weissbrodt, David, 2008, *Refugees*. In: The Human Rights of Non-citizens, Oxford: Oxford University Press, Oxford Scholarship Online, Available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199547821.001.0001/acprof-9780199547821-chapter-7 [Accessed 20 July 2018], paragraph 5.
23 *Ibid,* paragraph 6.

The objective claim must be demonstrated. It is not necessary that the situation had already happened with the individual requesting refugee. In fact, he or she can prove that his fear is "well-founded" if the situation already happened with a relative or individuals with similar characteristics.[24] Both subjective and objective criteria must be analyzed by the State. The confirmation of the existence of a "well-founded fear" must be corroborated by the competent authorities by analyzing whether the arguments presented by the refugee are reasonable or not.[25] The understanding of this term is fundamental to the application of the whole concept of refugee.

b) Persecution

Another part that is central to the definition of a refugee is the concept of "persecution". There is no unique definition for this term in international law or agreed between scholars. As a result, the concept of persecution has been gradually constructed by interpretation from States and international organizations such as the UNHCR. At the beginning of the 1980s, Goodwin-Gill linked the idea of persecution to the framework of human rights. In the 1990s, Hathaway emphasized this idea by defining persecution as "sustained or systemic violation of basic human rights demonstrative of failure of state protection".[26] This persecution definition making reference to human rights was gradually adopted by legal doctrine, and reinforced by the practice of state members of the Geneva Convention[27] through instructions of administrative authorities and judicial decision of domestic tribunal[28], for instance.

By analyzing the interpretation of Article 33 from the Convention, it was implied that a threat to life or freedom based on one of the five Convention grounds – religion, race, nationality, membership of a particular social group or political opinion – constitutes persecution. The definition of persecution is not limited only to those two human rights. According to the UNHCR, violations of other human rights on account of any of the five grounds are also considered persecution.[29]

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24 Weissbrodt, *supra* note 22, paragraph 7.
25 UNHCR, *supra* note18, paragraph 42.
26 Hathaway, James C., 1991, *The Law of Refugee Status,* Toronto: Butterworths, p 185.
27 Chetail, Vincent, 2014, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*. In Human Rights and Immigration, edited by Ruth Rubio-Marín. Oxford: Oxford University Press. Oxford Scholarship Online. Available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198701170.001.0001/acprof-9780198701170-chapter-2 [Accessed 23 July 2018], p. 26-27.
28 K. v. Refugee Status Appeals Authority [2005] NZAR 441 (2004), at [22].
29 UNHCR, *supra* note 18, paragraph 51.

States can establish their complementary understanding of the term persecution. The United Kingdom's House of Lords has agreed with the definition used by Professor James Hathaway to explain persecution. According to him, any violation of the human rights recognized by the international community can qualify as persecution.[30] The lack of a universal definition of persecution leaves the interpretation of the term open to the comprehension of the States; hence, they can choose when a restrictive or wide comprehension of the terminology may be applicable. It will depend on the political will of the member states.[31] It is noteworthy to mention that the Rome Statute of the International Criminal Court has its own definition of persecution in Article 7 (h),[32] and states members must abide to its terms. The Rome Statute understands that persecution can be based in political, racial, cultural, ethnic, religious, gender and other grounds – a wider range of grounds compared with the 1951 Convention.

The 1951 Convention neglected to identify who can be the agent of persecution. Generally, state authorities are the main perpetrators of acts of persecution. Nevertheless, sections of the population can also be responsible for acts of persecution if their acts are "knowingly" tolerated by state authorities or, even if those same authorities refuse or are unable to offer protection.[33] This position was adopted, for instance, in the policy guidance of the United Kingdom. They recognized that the agents of persecution might be a State, non-state or even any party or organization controlling the State.[34] Arguably, the source of persecution might come from States, but also from non-state entities.

c) The need to be outside country of nationality

One more crucial general requirement is that the refugee must be outside their country of nationality. It is not possible to grant the refugee international protection under the 1951 Convention if this person is still inside the territory of his or her home country.[35] This implies that the person must have crossed international frontiers. The refugee can enter the country of asylum legally or illegally. However, even if the refugee entered the country illegally, he or she cannot

30 Weissbrodt, *supra* note 22, paragraph 9.
31 Fitzpatrick, Joan, 1996, *Revitalizing the 1951 Refugee Convention*, Harvard Human Rights Journal 9, p. 240.
32 Rome Statute of the International Criminal Court, 2187 U.N.T.S p.3, entered into force on 1 July 2002.
33 UNHCR, *supra* note 18, paragraph 65.
34 UK Asylum Policy Instructions, Considering the Protection (Asylum) Claim and Assessing Credibility (2015), at 6.11 – 6.15.
35 UNHCR, *supra* note 18, paragraph 88.

suffer legal penalties due to this unlawful entry as long as they present themselves to the authorities and provide a reasonable explanation for the irregular entry.[36]

A person can also request a refugee status even if they entered the country legally. The so-called refugee *"sur place"* refers to those people that have left their country of nationality legally and who was not a refugee by that time they left. However, individuals can become refugees if, while abroad, a situation preventing their return emerges in the country of origin. Besides, the person can become a refugee "*sur place"* due to his actions such as expressing a political view or some of the other grounds. [37] The recognition of a refugee "*sur place"* will depend on a thorough analysis of the circumstances by the competent authorities of the country of asylum.

d) Unable or unwilling to receive protection

Another part of the definition that is relevant to the present thesis refers to the fact that a person must be unable or, due to well-founded fear, be unwilling to receive protection from his or her own country. In both cases, the person does not have the protection of his government. The difference remains in the refugee's volition. To be unable to receive the government's protection infers that receiving or not the protection goes beyond the choice of the person. The refugee does not express their wishes regarding this issue, and this might be explained if the country is going through a war or other serious disturbances. The state is, therefore, impeded from providing protection, or this protection is not sufficient because of this plight. The denial of protection also fits the definition of being "unable". Regarding the term unwilling, it suggests that the refugee refuses to receive the protection of its government and this refusal is based on a well-founded fear.[38]

e) Convention Grounds

The well-founded fear mentioned above must be intertwined with one of the five reasons for persecution, the so-called "Convention grounds". The Refugee Convention established five reasons for persecution: race, religion, nationality, membership of a particular social group or political opinion. Persecution might be attributed to just one reason or multiple reasons.

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36 Convention Relating to the Status of Refugees, *supra* note 6, article 31.
37 UNHCR, *supra* note 18, paragraph 94.
38 Convention Relating to the Status of Refugees, *supra* note 6, Article 31.

The definition of a race comprehends a broad understanding. It comprises all sorts of ethnic groups commonly referred to as "race". Belonging to a specific racial group is not usually enough to prove the claims of the refugees. [39] Only under certain conditions might this reason be enough to prove a well-founded fear of persecution. The religion reason can be identified in different situations. Prohibition of worship in private or public spaces, discrimination due to belonging to a certain religion and other circumstances are some of the examples of persecution for reason of religion. [40]

The third reason is "nationality". This term does not refer only to citizenship, but also encompasses the idea of being a member of an ethnic or linguistic group, for instance.[41] The fourth, membership of a particular social group, will be discussed in more detail in the following topic. The last reason is "political opinion". To have a different political opinion from the government is not itself grounds for a refugee claim. The refugee applicant must prove that they fear persecution because they have such a political opinion. The individual must prove that their political opinion is not permitted by the authorities and that this opinion is known to the government, for instance.[42]

These are four of the five convention grounds. They are used to substantiate refugee claims. However, I find it hard to establish these four grounds as reasons for persecution regarding the claims of the "climate refugees". Nonetheless, they are described here as it is not impossible to connect these grounds in specific situations.

f) Membership of a particular social group

The last part worth mentioning, therefore, is the term "membership of a particular social group". Persons with similar background, habits or social status are identified as belonging to a particular social group. The membership of a certain group may be the cause of persecution due to political preferences, antecedents or economic activity of the members of the group, or even the mere existence of the group. All these cases can be considered an obstacle to government's policies and, hence, a cause for persecution. However most of the time, this is not enough to substantiate the claim for refugee status.[43] An important aspect of this term relies on the fact that this ground is

39 UNHCR, *supra* note 18, paragraph 68-70.
40 UNHCR, *supra* note 18, paragraph 71-73.
41 UNHCR, *supra* note 18, paragraph 77-79.
42 UNHCR, *supra* note 18, paragraph 80.
43 UNHCR, *supra* note 18, paragraph 77-79.

particularly broader than the others, and as such, it may encompass different situations of persecution that do not fit the other grounds.[44]

The analysis of all these terms is extremely relevant to understand the scope of application of the 1951 Convention. The problem with the interpretation of the refugee definition is a real issue. The lack of a universal conceptualization of the terms used in the definition allows the ambiguity and subjectivity of application of the Convention. As Eduardo Arboleda argues, "Lacking such uniformity of application, the 1951 Convention definition is fast becoming over-legalistic, mired in juridical abstraction, removed from the reality facing refugees, and subject to the vagaries of national interests".[45] States can deeply influence the understanding of the refugee definition, and it could jeopardize the scope of this universal instrument.

To sum up, conceptualizing the term refugee was always a sensitive task for the international community, as states did not want to bind themselves to a legal instrument that could entail in severe obligations to them. Yet, relative accomplishments were achieved regarding refugees' protection in the last decades. The 1951 Convention and the 1967 Protocol were landmarks to guarantee the rights of refugees. As one can conclude, the definition of the Convention intended to limit the scope of application of this legal instrument to restricted situations. However, the international law definition should not imply that people outside this definition are not entitled to protection. As Jane McAdams claims "Definitions serve an instrumental purpose. They are bureaucratic labels that delimit rights and obligations".[46] The possible impact upon states of broadening the interpretation of the definition is what prevents a wider application of the Convention to the new types of refugees that have emerged in the last decades. The case of the so-called "climate refugees" is a great example of this issue. Are they entitled to refugee protection or not? Who are these climate refugees?

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44 Weissbrodt, *supra* note 22, paragraph 17.
45 Arboleda, Eduardo; Hoy, Ian, 1993, *The Convention Refugee Definition in the West: Disharmony of Interpretation and Application*, International Journal of Refugee Law vol. 5, no. 1, p.76.
46 McAdam, Jane, 2014, *Climate Change, Force Migration, and International Law.* Oxford: Oxford University Press, p. 42.

Chapter Two: Background History of Climate Refugees

Natural disasters have always been one of the causes of human displacement. Drought, flood, earthquakes, tsunamis are just some of the examples of environmental events that induced people to migrate throughout the centuries. Not only can natural events cause human displacement, but climate change has also been pointed out as a reason for migration.

When the 1951 Convention was elaborated, the effects of climate change were not even in discussion within the international community. Only from the 1970s onward did this topic attract the attention of society and international institutions. It was only after years of study that states began to address environmental problems seriously. The possible consequences of climate change in daily life and the future of societies have gradually been acknowledged by the international community as an important topic that must be discussed.

During the 1992 "Earth Summit", the definition of climate change was tailored in the document produced and called the "United Nations Framework Convention on Climate Change". According to this document, climate change means "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to another natural climate variability that has been observed over comparable time periods".[47] The Intergovernmental Panel on Climate Change created a broader definition as they believe that climate change is "any change in climate over time, whether due to natural viability or as a result of human activity".[48] There is no consensus whether the causes of climate change are natural or human-made. Nevertheless, the consequences of climate change are a reality worldwide, and can be observed mainly in small island states, Africa and Asian mega-deltas.[49]

If environmental disasters influenced the displacement of people in the past, it is only natural to assume that forced migration might be enhanced by the negative impacts of climate change on the environment. The exact number of how many people can be affected by climate-related events is still a guess; however, in the 1990s, Myer estimated that 25 million people would be displaced due to climate change.[50] The inaccuracy of the exact number is explained by the fact

47 United Nations Framework Convention on Climate Change, 1992, entered into force 21 March 1994, Article I (2).
48 Intergovernmental Panel on Climate Change, 2007, Fourth Assessment Report, Climate Change 2007: Synthesis Report, Available at: http://www.un-documents.net/ipcc-ar4/syr.pdf. [Accessed 29 March 2019]. Topic 1.
49 Kälin, Walter, Schrepfer, Nina, 2012, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches,* Legal and Protection Policy Research Series, United Nations High Commissioner for Refugees, p. 4.
50 Myers, Norman, Kent, Jennifer, 1995, *Environmental Exodus: An Emergent Crisis in the Global Arena,* Climate Institute, Washington DC, p. 1.

that climate change cannot be appointed as the unique factor causing movement. Usually, there are several different already pre-existing causes influencing the movement of people, hence the effect of climate change is likely a trigger to motivate people to migrate.[51] It is hard to establish an exclusive link between the effect of climate change and migration; nevertheless, Walter Kälin identified five scenarios where it is possible to foresee the connection between climate change and the movement of people.[52]

The first situation envisioned by him is the "sudden-onset disasters". Flooding, windstorms or mudslides are some of the examples. These kinds of phenomena can prompt massive displacement of people escaping the immediate consequences of the disaster. Often the displacement, in this case, is limited within the country. However, there are cases of international cross-border displacement. For instance, when the natural disasters are recurrent, or in situations that the high level of destruction of the country in the aftermath of the disaster prevents people from returning and inhabiting there immediately.

The second scenario is the "slow-onset environmental degradation" which are the long-term negative impacts caused by climate change. Rising sea levels, droughts, desertification, increased salinization of groundwater and soil are just some typical examples. In these cases, the movement of people will be influenced by the degree of degradation. A constant flooding of coastal zones, desertification or the rising level of the sea can transform a territory in an uninhabitable area, and as such, would force people to move to another location, inside the country or outside the country of origin.

The "low lying small island states" or the so-called "sinking states" are a particular case of slow-onset degradation. The continuous rising of sea level in areas of low-lying typology may provoke the emigration of people to other countries as these states disappear or become uninhabited.

The fourth scenario is the "areas prohibited for human habitation". In this case, the state is responsible for displacing people with the intention of protecting the population from environmental dangers.

The last situation is "unrest seriously disturbing public order, violence or even armed conflict". This scenario may arise from a decrease in essential resources caused by climate change. It is likely that this situation occurs in areas with reduced water availability where there is no option

51 McAdam, *supra* note 46, p. 17.
52 Kälin, *supra* note 49, p. 13-15.

to change economic activity to one requiring less water. The limited availability of this resource increases the possibility of situations disturbing the public order.[53]

The classification of these scenarios was envisioned to explain the causes of movement of people displaced by climate change-related events. Despite the difficulty in identifying climate change as the sole and unique cause of displacement in some situations, it is impossible to completely ignore the consistent evidence of the consequences of climate change on the proper functioning of the environment. For many years, these forcibly displaced people were denominated as environmental or climate refugees.

The identification of the possible circumstances causing displacement of people due to climate change-related events is therefore essential to understanding the current situation of the so-called "climate refugees". The comprehension of what triggered the forced displacement is fundamental to guaranteeing the proper protection of the individual under international law. As one can observe, the type of displacement can be external or internal and forced or voluntary; the kind of movement is profoundly influenced by the nature of the environmental hazard. For instance, sudden-onset disasters can force people to move within the country or to cross borders, and in each one of these cases, the international law response will be different. For that reason, it is important to understand different terminologies used to address people displaced in these different scenarios.

2.1 Difference among internally displaced person, externally displaced person, and refugee

Establishing a nomenclature and a definition is crucial to correctly identify the rights and duties of the parties under the law. For that reason, the core concepts presented by treaties, doctrines or other forms of international law are so important. Three concepts are widely used when referring to migration and refugee issues: internally displaced persons, externally displaced persons, and refugee. Understanding the different nuances among these terms is relevant to comprehend the underlying concepts of migration and refugees. Much misconception occurs because of the misuse of these terms.

At first glance, the idea of conceptualizing people displaced within their own country might seem senseless as it appears to be a typical case that should only be the domestic/internal concern of each state. However, one cannot mistake internal migrants and internally displaced persons (IDPs).

53 I*bid,* p.16.

The broader concept of internal migrants defines those people who decided to move from their home to establish themselves in a new residence.[54] If we narrow the analysis for a climate change-related event, then the cause of displacement refers to the effects of climate change. In this case, the migrant decides to move because there is an environmental factor affecting his situation negatively. It is a decision rather than an imposition.[55] It is precisely the opposite case of what happens with IDPs; they were forced to leave or flee from their home.

The situation of the internal displacement of person became a concern to international community due to the high number of internal displacements worldwide. Millions of people were being forced to move within their country as a consequence of conflicts, violations of human rights and other traumatic experiences. As a result, the United Nations gathered its members' states and created the Guiding Principles on Internal Displacement.

According to this document, internally displaced persons "are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflicts, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border".[56]

It is important to mention that the Guiding Principles is a soft law instrument and a non-binding document. In other words, states are not obliged to follow the principles of the GPID. Nevertheless, the international community recognizes the importance of this instrument in the protection of IDPs, and more countries are incorporating these norms into their domestic laws.[57] The African Union, the former Organization of African Unity, adopted a regional and binding instrument to their member states to protect and assist internally displaced persons in Africa, the so-called Kampala Convention. It adopted the same definition previously used in the Guiding Principles on Internal Displacement to define IDPs.[58]

It is widely known that the majority of the cases of displacement caused by climate change-related events occur within the borders of the country. However, the concept presented in the Guiding Principles does not expressly refer to climate change as the cause of internal displacement.

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54 International Organization for Migration, 2004, *Glossary on Migration*, International Organization for Migration, ISSN 1813-2278.
55 Kälin, *supra* note 49, p. 24.
56 Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2, 11 February 1998.
57 Kälin, *supra* note 49, p. 30.
58 African Union, 23 October 2009, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), entered into force on 6 December 2012.

They mention natural and man-made disasters as possible reasons for internal displacement. Despite that fact, as the list of causes of this document is not exhaustive, it means that further interpretations are possible. In this sense, the inclusion of displacement linked to climate change within the framework of this document is possible.[59] According to the classification of climate-induced displacement adopted by Kälin, the concept of IDPs described in the guidelines is broad enough to encompass people fleeing their homes escaping sudden-onset disasters, or if they were forced to leave their residence in the aftermath of the disaster because of the level of destruction of their home/city.[60] Climate change can be one of the causes of internal displacement indeed.

There is a fundamental difference between internally displaced persons and externally displaced persons. According to the IOM Glossary on Migration, the concept of externally displaced persons is people "who have fled their country due to persecution, generalized violence, armed conflict situations or other man-made disasters".[61] Nevertheless, this definition is not adopted by international law or widely accepted by the refugee regime, which might prevent people meeting one of this criterion to receive legal protection once they crossed international borders.

In cases of climate change-induced events, such as sudden-onset disasters, people might cross international borders to seek protection and assistance because their own country is not able to provide their security anymore, or when this is the only possible escape route for the person.[62] Even though states must respect the human rights law of the externally displaced persons, they are not obliged to receive them if they are not considered as refugees or if they are not protected by the principle of *non-refoulement.* Some specific situations can entail the refugee protection in cases of climate-related cases; however, the majority will not be covered by refugee law.[63]

One can conclude that there is a normative gap in the case of external displacement caused by sudden-onset natural disasters.[64] The norms about admission, continued stay and protection against forced return to the country of origin for externally displaced persons are not regulated by

59 Chairperson's Summary, 2011, The Nansen Conference Climate Change and Displacement in the 21st Century, Norwegian Refugee Council; Kälin*, supra* note 49, p. 22;
60 Kälin, Walter, 2010, *Conceptualising climate-induced displacement,* in Mc Adams, Jane, Climate Change and Displacement. pp. 81- 103, Available at: http://www.legalanthology.ch/wp-content/uploads/2013/12/Kalin-Conceptualising-Climate-Induced-Displacement1.pdf
61 International Organization for Migration, *supra* note 54.
62 Kälin, *supra* note 60, p. 87-88.
63 Ibid.
64 Chairperson's Summary, *supra* note 59, paragraph 23.

international law. However, some countries may grant a visa for humanitarian reasons to these externally displaced persons, but this is not what we can describe as a consolidated state practice.[65]

Finally, as the definition of refugee was already explored in the previous chapter, only some considerations are relevant here. The universal definition of the term refugee is outlined in the 1951 Convention, and it is the primary source of refugee law regime. Other instruments appeared afterward to expand the definition of refugees. To explain briefly, as these instruments will be thoroughly analyzed in the next chapter, the OAU Convention, and the Cartagena Declaration are two documents widely recognized as essential steps in expanding the refugee definition. It is noteworthy that states are stringent regarding the aspects of the refugee definition because a narrow or a broader interpretation may cause several social and economic impacts on the country. For that reason, states are extremely concerned about defining who can fit under the scope of refugee.

These three terms are widely used when one is dealing with migration and refugee issues. Only by understanding these definitions is it possible to comprehend why some people reject the nomenclature of environmental refugees, for instance. The different terminologies adopted to refer to climate change refugees will be further explained in the following sections.

2.2 Definitions of Climate Refugees and its problems

There is no consensus about the proper terminology for addressing people that are displaced because of the effects of climate change. Some nomenclatures are more accepted than others, but there is no unique term used to describe this situation. And there is in fact no universal international law-based definition that would encompass them.

In 1976, Lester Brown introduced the term environmental refugee; nevertheless, this terminology only became popular a few decades later. Essam El-Hinnawi is generally referred to as the person who provided the most well-known definition of the term “environmental refugee”. He defined environmental refugees as “those people who have been forced to leave their tradition habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life”.[66]

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65 Kälin, *supra* note 60, p. 87-88.
66 El-Hinnawi, Essam,1985, *Environmental Refugees,* Nairobi: United Nations Environment Programme.

Other definitions of environmental refugee appeared in the following years. Myers defines this category of refugee as people "who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems, together with associated problems of population pressures and profound poverty. In their desperation, these people feel they have no alternative but to seek sanctuary elsewhere, however hazardous the attempt".[67] These scholars are well-known for using the terminology "environmental refugee" to refer to people displaced because of climate change-related events. Besides this nomenclature, the term "climate refugee" is also widely used. Environmental and climate refugees are used as synonyms with no substantial difference in concept between these terms. News articles frequently use both terms as it is easier to be understood by the general public. The broad adoption of this term by media can be explained as these terms are "a useful advocacy tool to generate attention and mobilize civil society around the dangers of global warming[..]".[68] Environmental scholars are most frequently supporters of the utilization of these two terms.

Some people were not satisfied with these initial definitions. Astri Suhrke believed that a narrow definition would be more precise to address this issue adequately. She argues that there is a distinction between environmental migrants and environmental refugees. The former consists of people leaving their country for voluntary choice in a combination of "pull-and-push factors" meanwhile the latter refers to people fleeing their country due to "extreme environmental degradation".[69]

There is a general use of the term "environmental refugee" by scholars, media, and the general public; however, several international organizations such as the UNHCR, and the IOM have criticized the use of "refugee" to refer to those people. In their view, the use of this terminology is problematic as displacement caused by climate change is not one of the grounds predicted in the 1951 Convention, hence these people could not be called as refugees.

The terminology adopted by these organizations to refer to climate refugees is "environmentally displaced persons". This term is defined as "persons who are displaced within their own country of habitual residence or who have crossed an international border and for whom

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67 Myers, Norman, 2005, *Environmental Refugees: An Emergent Security Issue,* Section III- Environment and Migration, 13th Economic Forum, p. 1.
68 McAdam, *supra* note 46, p. 40.
69 Suhrke, Astri, 1993, *Pressure Point: Environmental Degradation, Migration and Conflict*, p. 7-9, occasional paper prepared for the workshop on "Environmental Change, Population Displacement, and Acute Conflict," held at the Institute for Research on Public Policy in Ottawa in June 1991 as part of the "Environmental Change and Acute Conflict" project of the Peace and Conflict Studies Program, University of Toronto and the American Academy of Arts and Sciences, Cambridge, Massachusetts.

environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one".[70] This term was coined as a replacement for the usage of environmental refugee or climate refugee as they claim that this terminology has no legal basis in international refugee law.[71] For those arguing that people displaced because of climate change cannot be considered refugee the use of these two terms is considered a misnomer. It is noteworthy that the concept adopted by these international organizations also does not have any legal basis, but international institutions might have an important role in the legalization of new terms.

The IOM adopted a broader concept for environmental migrants that could be able to encompass the complexity of the situation. According to this definition environmental migrants "are persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad".[72] International organizations are concerned with accurately conceptualizing terms to avoid the misuse and misunderstanding in the application of these concepts. Arguably the IOM refers to environmentally displaced persons as a category of environmental migrants to establish that the former is a sort of migrants and not refugees.

Kälin criticizes the definition adopted by IOM. He argues that this definition does not distinguish between the internal and external movement of people, and this could undermine the relevance of instruments protecting IDPs. Also, the definition encompasses forced and voluntary movements, and it makes no distinction between these two terms. The differentiation between these two terms is crucial to not compromising the legal protection of migrants.[73]

There is no general agreement in international law about the proper terminology to define people moving because of the effects of climate change. As one can observe, there are fundamental differences not only in the nomenclature but also in the fundamental characteristics that are used to describe this sort of displaced people. While the adoption of the term environmentally displaced person seems to be more accurate to define people displaced by climate change, the definition associated with this term has substantial differences for the concept used to define environmental refugee. The term "climate refugee" or "environmental refugee" might not be the most adequate

70 International Symposium, 1996, Environmentally-Induced Population Displacement and Environmental Impacts Resulting from Mass Migrations, United Nations High Commissioner for Refugees, International Organization for Migration & Refugee Policy Group, p.4.
71 Environmental Migration Portal, *Environmental Migration*. Available at: http://www.environmentalmigration.iom.int/environmental-migration, [Accessed 27 July 2018].
72 Ibid.
73 Kälin, *supra* note 49, p. 29.

terminology to describe people displaced by climate-related events. The author decided to use the term "external environmental migrant" to describe those people that moved out of their countries due to climate change reasons.

a) Main reasons for the inadequacy of the term "environmental or climate refugee"

The explanations for the inappropriate use of the terms "environmental refugee" or "climate refugee" are extensive. The first argument used is that environmental refugees cannot be described as refugees according to the *per se* definition of the 1951 Convention.

Several reasons were pointed out as justification for why climate refugees could not fit under the scope of the 1951 Convention. Three elements are crucial to define someone as a refugee: 1) the person must be outside the country of nationality; 2) the elements of persecution and 3) the five grounds. Regarding the first element, the Convention requires that the refugee must have already crossed international borders to require asylum. However, it is widely known that most of the cases of displacement caused by climate change occur within the country, without crossing the borders.[74] In this case, people internally displaced within the country would not be entitled to refugee status under the Convention; the Guideline Principles on Internal Displacement would be the appropriate document to protect IDPs.

The second hindrance is the persecution element. The 1951 Convention describes some requirements to consider someone as persecuted. It is necessary to have a well-founded fear of being persecuted based on one of the five grounds described in the Convention. Also, the persecution requires an actor. The Convention does not expressly mention who the persecutors are, however most scholars agree that states and non-states can be the actors.

These essential elements must be considered to assess the existence of persecution in the cases of external environmental migrants. The majority of scholars and international organizations argue that none of the five grounds is present in the situations of EEM, and this would be the first indicator of the inexistence of persecution in the "climate refugee" claims.

The other main feature hinges on the fact that persecution requires an actor. In this sense, the agent of persecution would have to be the "nature" or the "environment". However, climate

74 Ni, Xing-Yin, 2015, *A Nation Going under: Legal Protection for Climate Change Refugees*, Boston College International and Comparative Law Review 38, no. 2, p. 341.

change is not an entity, and for that reason the intent of harm is inexistent (an attribute necessary to characterize an agent of persecution). Hence, it would not be suitable to describe the situation of "climate refugee" as persecution.[75] To sum up, it is difficult to fit climate change or the environment as an agent of persecution. Therefore, the analysis of the components of the persecution act and its grounds corroborate the inadequacy of referring to people displaced by climate change events as refugees.

Despite the wave of scholars against the adoption of the term "environmental refugee", some people still reassure that "climate refugees" meets the definition used by the 1951 Convention. Jessica Cooper strongly advocates in this sense, as she argues that one criterion of five grounds and persecution are present in several situations regarding environmental refugees.[76] According to her, three categories of environmental crises may induce forced migration. She divides them into a) long-term environmental degradation, b) sudden natural environmental disruptions and c) chemical or industrial accidents. The argument presented is that in all these cases, the government "knowingly harmed individuals by causing or contributing to the degradation of their environment. Environmental degradation harms individuals on a fundamental level. It makes them flee their homes in search of an inhabitable environment. It forces them to migrate to protect their lives. When governments knowingly induce environmental degradation, and that degradation harms people by forcing them to migrate, a form of persecution occurs".[77] According to Jessica Cooper, the action or the lack of action of a government can increase the environmental degradation, and, hence, the criteria of persecution of the 1951 Convention would be met.

As discussed, states might be agents of persecution if one can attribute to them the intent of harm or failure to prevent harm. In certain situations, when the state has the means to prevent or to tackle environmental issues that might cause forced displacement, and it does not act in this sense, states could be a persecutor and the 1951 Convention could be applicable in the situation of external environmental migrants.

Regarding the elements of the five grounds, Jessica Cooper argues that environmental refugees fit in the "social group" term. She claims that the concept of the social group is broader than the other grounds on purpose, as the underlying intention was to allow the protection of refugees persecuted due to unforeseen reasons. In her own words, environmental refugees are

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75 Renaud, Fabrice G., Bogardi, Janos, Dun, Olivia, Warners, Koko, 2011, *A Decision Framework for Environmentally Induced Migration,* International Migration, vol. 49, p. 6-29, ISSN 0020-7985, p. 12.
76 Cooper, Jessica. B., 1998. *Environmental refugees: Meeting the requirements of the refugee definition,* New York University Environmental Law Journal, vol. 6, no.2, p.480-530
77 *Ibid,* p. 520.

"persecuted for reasons of their membership in a particular group. This social group is composed of persons who lack the political power to protect their own environment".[78] In her assessment, "climate refugees" should be protected under the terms of the 1951 Convention. The position adopted by Jessica Cooper is not dominant; a significant number of scholars and international organizations claim that people displaced by environmental causes are not refugees and, hence, not entitled to protection under the 1951 Convention. It is hard to state that all EEMs are part of this particular social group.

Not only do scholars reject the usage of the term climate refugees, but some people ascribed as environmental refugees renounce being labeled with this terminology. The populations of small island nations in the Pacific that might disappear in the future, like Tuvalu and Kiribati, do not accept being described as climate refugees. In their view, this puts a stigma on the victim, not on the offender, as they are directly affected by the effects of climate change to which they did not contribute. Besides, the idea of fleeing their own government is inherent to the concept of refugee. In their case, they do not wish to escape their country; they are being forced to do it, and this is another reason why they do not accept being addressed as climate refugees.[79]

The other criticism of this nomenclature relies on the fact that the term climate refugees gives the impression that the displacement is caused exclusively by climate change. The consequences of climate change are mostly well-established within the international community; also the chances that the climate change effects may further migration movement is also widely accepted. Nevertheless, there is no scientific proof to certify that climate change can be the sole cause of human displacement. There is a collective agreement about the multi-causality of human displacement caused by climate change. Researchers have pointed out that decisions to move or to remain in a particular place are also determined by the general socio-economic situation of the person fleeing.[80]

The Chairperson's Summary of the Nansen Conference reinforces this idea by asserting that "Climate change acts as an impact multiplier and accelerator to other drivers of human mobility".[81] In this same document, there is a recommendation that both the terms "environmental refugee" and "climate refugee" should not be used as they are "legally inaccurate and misleading". The suggestion is to use the term "environmentally displaced person" – the same terminology adopted

78 Cooper, *supra* note 76, p. 521-522
79 McAdam, *supra* note 46, p. 41.
80 McAdam, *supra* note 46, p.20.
81 Chairperson's Summary, *supra* note 59.

by other international organization such as the IOM. The main obstacle, in this case, is to consider climate change as the primary cause of displacement. In this case, Keane argues that if one cannot indicate that environmental changes are the cause of refugee displacement, there is no point in denominating them "environmental refugees".[82]

Some scholars and international organizations consider the use of the term "climate refugee" as a misnomer. In their view, environmentally displaced persons would not fit the definition of refugee. Despite that fact, these same people recognize the application of the 1951 Convention in certain situations. For instance, when there is a denial of assistance and protection to disaster-struck population groups,[83] or in the case of a government inducing famine by destroying crops or poisoning water as a political tool, or when the government pollutes the land or rivers, hence contributing to environmental destruction.[84] In all these cases, it is possible to envision the application of the 1951 Convention, as some specific situations can prompt states to recognize these persons as refugees. The circumstances motivating people to flee therefore can define who is entitled to refugee protection or not.

As one can observe, there are many issues with the terminology adopted to refer to persons displaced for climate change events. The international community has not reached an agreement regarding the nomenclature and the definition of those displaced persons. It is of governments' interest to keep "the definition narrow because of the obligations they have to refugees" as most states prefer to restrict this definition rather than broadening it.[85]

However, the adoption of a unique definition and term is crucial to indicate what kind of legal protection these people are entitled to. It is precisely that fact that might prevent a broader interpretation of external environmental migrants as refugees. The 1951 Convention was created in a completely different historical context from the present. At that time, the effects of the climate change were not even in the discussion.

It is undeniable that there are many aspects concerning climate refugees that still need in-depth study. There is no doubt that climate change has been affecting the livelihood of people in several different ways, which may induce people to flee their home for different kinds of reasons. It

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82 Keane, David, 2004, *The Environmental Causes and Consequences of Migration: A Search of Meaning of Environmental Refugees*, Georgetown International Environmental Law Review, vol. 16, no. 2, p. 222.
83 Chairperson's Summary, *supra* note 59, paragraph 20.
84 McAdam, *supra* note 46, p. 47.
85 Boano, Camillo, Morris, Tim, Zetter, Roger, 2008, *Environmentally Displaced People Understanding the Linkages between Environmental Change*, Livelihoods and Forced Migration, Refugee Studies Centre, University of Oxford, p. 10.

is pressing that the international community and international institutions should collaborate to reach an agreed term and definition to refer to those people displaced by climate change-related events.

Collaboration has already proved to be useful in dealing with the issue of refugees. Africa and Central America have shown to the international community that the willingness to overcome a regional problem may generate new solutions and positively impact international law.

Chapter Three: Other International Law Instruments for Refugee Protection

The 1951 Convention remains the primary instrument in international law suited for conferring protection to refugees. Nevertheless, the scope of the Convention may be limited by the requirements described in its refugee definition. As a result, countries suffering from refugee crises for different reasons from those five grounds described in the Refugee Convention may choose not to grant protection if the person fleeing is not compatible with the Convention's refugee description. It is noteworthy that states have the discretionary to grant protection for displaced people regardless of whether they fit the Convention or not.

As the 1951 Convention failed to encompass different types of refugees, some countries had the initiative to create new legal instruments to address their needs. African and Central American countries are the two main examples of regions that have experienced a significant inflow of refugees in their history. Since the 1951 Convention was not adequate to ultimately tackle the refugee crises of these regions, their governments had to find an outside option to deal with the situation. The outcome was the formulation of two new regional instruments to address the plight of refugee of their regions.

3.1 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

During the late 1950s and 1960s, many African states were abandoning their status of colonies to become newly independent countries. The process of independence in many countries was marked by internal and external conflicts which entailed political and social instability in the region. Ethnic conflicts, civil wars and inter-state conflicts were some of the side effects of the end of the colonial system in Africa.

Africa was under the domain of foreign domination for a long time. Once African states became independent, they struggled to address these new post-independence problems individually. As a result, these countries decided to create an organization that aimed to coordinate and intensify cooperation among African countries and at the international level. The organization was not limited to cooperation; it intended to defend the sovereignty of the countries and to guarantee

territorial integrity and independence, among other objectives. Hence, in 1963, African countries created the Organization of African Unity[86].

This period of turbulence can be pointed out as one of the leading causes of the problem with refugees in Africa at that time. The OAU acknowledged their concern with the refugee problem in the continent and how this plight caused discomfort between its member states.[87] For that reason, in 1969, forty-one heads of state and governments from African countries assembled to create the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[88] The OAU Member States considered that the particularities of the refugee situation in Africa required a regional approach, hence the creation of the 1969 OAU Convention.

When the OAU Convention was elaborated, the 1951 Convention and its 1967 protocol were already in vigor; however, the African states did not believe that this instrument alone would be adequate to tackle the refugee crisis in Africa.[89] The situation that led to that critical situation in Africa was very particular with different causes and consequences that were not addressed by the 1951 Convention. It is noteworthy that the OAU Convention did not aim to supersede the 1951 Convention. In fact, the African instrument recognizes that the United Nations Convention constitutes the fundamental and universal instrument concerning the status of refugees. The creation of a new regional legal instrument to surmount the refugee issue in Africa was considered a significant innovation and landmark in refugee law.

The Member States decided to conceive a new definition for the term refugee, inasmuch as the OAU Convention was designed to be supplementary to the 1951 Convention. The OAU Convention incorporated the definition of the 1951 Convention and, at the same time, broaden it by including a secondary definition for refugee that they considered to be the adequate conceptualization for their current problem.

The OAU states were also concerned with differentiating those people peacefully seeking asylum and the so-called "subversive" refugees. The wave of independence in Africa was peaceful in some countries; nevertheless, other countries resorted to armed struggle to become independent. The problems of the newly independent African countries were not limited to foreign domination, yet it also encompassed internal political crises, ethnic conflicts, and armed struggles by liberation

86 Organization of African Unity (OAU), 25 May 1963, Charter of the Organization of African Unity, available at: http://www.refworld.org/docid/3ae6b36024.html [Accessed 17 July 2018]
87 Nyanduga, Bahame Tom Mukirya., *Refugee Protection under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,* 2004, German Yearbook of International Law, vol. 47, p.87.
88 Convention Governing the Specific Aspects of Refugees Problems in Africa, *supra* note 7.
89 Oloka-Onyango, Joe., *Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years after Geneva*, 1991, n. 3, International Journal of Refugee Law, p. 54.

movements. Those individuals, seeking asylum in other countries with the "sole purpose of fomenting subversion from outside" were considered as subversive refugees.[90] This specific sort of refugee was a concern to OAU members and, hence, Article 3 of the Convention specifically addressed this issue by prohibiting subversive activities against any member states. Undoubtedly, this provision of the Convention was a particularity of this legal instrument as it was related to a relevant problem faced by some African states during this period.

The principle of *non-refoulement*, which is present in the 1951 Convention, is also present in the OAU Convention. This norm establishes the prohibition of expelling or returning a refugee to the territory where his life or freedom may be threatened based on one of the five grounds described in the 1951 Convention. However, the Refugee Convention foresees an exception of the application of this principle in cases where the refugee is considered a danger to national security of the country[91]. States are not obliged to the *non-refoulement* principle if the individual claiming refugee poses a threat to the receiving state.[92]

The OAU Convention, however, did not include the exception rule of national security previously stated in the 1951 Convention. In fact, the OAU Convention does not refer explicitly to the *non-refoulement* principle, but the core concept of this principle is present in article II (3) under the Asylum part. Article II (3) echoed the content present in the United Nations Declaration on Territorial Asylum from 1967. Added to article II (3) was the phrase "rejection at the frontier" to the concept of prohibition of return. In the 1951 Convention, the *non-refoulement* principle does not encompass this concept of not rejecting a person at the frontier. By including this concept, the OAU Convention has, to some extent, broadened the application of the *non-refoulement* principle for the states adopting this norm. Even though the OAU Convention is mainly a regional legal instrument with no legally binding effect to countries outside the territory of its Member States, it influenced the practice of states in the application of the *non-refoulement* principle by adding measures such as the prohibition of rejection at the frontier. Also, it extended the scope of the principle to a "broader category of refugees" as the OAU Convention established an expanded concept of refugee. [93]

The innovations presented by the OAU Convention were a landmark in the development of the international refugee regime. Indeed, the formulation of a different concept for the term refugee from what was previously established by the 1951 Convention can be considered one of the milestones of the OAU Convention.

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90 Convention Governing the Specific Aspects of Refugees Problems in Africa, *supra* note 7.
91 Convention Relating to the Status of Refugees, *supra* note 6, art. 33 (2).
92 Hathaway, *supra* note 10, p. 342.
93 Goodwin-Gill, Guy S., 1988, *Non-Refoulement and the New Asylum Seekers*, Immigration and Nationality Law Review 1988, p. 389 – 390.

3.1.1 A New Refugee Definition

The OAU Convention has been considered a landmark to the refugee regime due to the alternative conceptualization used the by the member states to define the term refugee. Although the definition of the 1951 Convention is present and included in the OAU Convention, the concept used in the universal instrument could not properly address the refugee situation in Africa. As a result, the OAU Convention created a second definition of the term refugee that could be adequate to tackle it.

In accordance with the OAU Convention, a refugee is "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".[94] By observing the definition presented by the OAU Convention, one can perceive the concern of the Member States with the framework of post-colonial conflicts and problems that took place in Africa by that time. This definition was designed to deal with a wide range of issues, from people fleeing their former colonies to those escaping from racist regimes.[95]

While the 1951 Convention focused on the subjective criteria such as the "well-founded fear of persecution", the OAU Convention's most notable feature of this new definition regards the focus on the objective criteria. The definition of the OAU Convention broadens the scope of the term refugee as it is "based solely on objective criteria, which means that persons leaving their country because of war, violence or civil disturbances are to be given refugee status by the state parties to the OAU Convention, irrespective of whether or not they can satisfy subjective criteria".[96] The focus on the objective criteria was a reflection of the African reality. The mass migration caused by post-colonial problems made the individual analysis of claims somewhat impracticable. Furthermore, African states did not have the necessary decision-making infrastructure to deal with such a high number of demands.[97] The different terminology adopted by the OAU Convention did not obligate the refugees to justify if their fear of persecution was well-founded as required by the 1951 Convention.

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94 Convention Governing the Specific Aspects of Refugees Problems in Africa, *supra* note 7.
95 Nyanduga, *supra* note 87, p.92.
96 Awuku, Emmanuel Opoku, 1995, *Refugee Movements in Africa and the OAU Convention on Refugees*, Journal of African Law, vol. 39, no. 1, p. 81.
97 Arboleda, Eduardo, 1991, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, International Journal of Refugee Law, vol. 3, no. 2, p. 195.

The new elements for the grounds necessary to be considered a refugee, introduced by the refugee definition of the OAU Convention, are fundamental for this thesis. The terms "external aggression", "occupation", "foreign domination" or "events seriously disturbing public order" are in the core of the definition of refugee; however, the OAU Convention did not specifically define the concept of these terms, leaving the interpretation of their meaning open to discussion. Attempts have been made to define some of these terms. The General Assembly of the UN, for instance, adopted Resolution 3314[98] in 1974, which tailored a definition of aggression.

Despite that, there is no clear-cut and agreed definition of these terms under international law, and that can make the individual analysis of these terms even broader. The first three grounds were envisaged in the context of the fight against colonialism, and even though they might have lost their prominence, they are still relevant in the context of international armed conflicts.[99]

The fourth ground, "events seriously disturbing public order", gained relevance as the refugee issue evolved to new problems caused by different circumstances other than the situations conceived at the time of creation of the OAU Convention. The relevance of this term lies in the fact that this term is the most flexible, therefore, it can apply to a wide range of refugee situations occurring in Africa throughout the years and even nowadays.[100] In this sense, people fleeing from environmental disasters or changes could be included in this broader definition of refugee.

The reflections about including "environmental refugees" under the scope of protection of the OAU Convention is a reiterate issue. In 1983, Rwelamira mentioned in his article the emergence of "a new class of refugees who are forced to leave their countries of origin or habitual residence because of ecological changes and their effect on the environment".[101] He asserts that the refugee definition of the OAU Convention is certainly "wider and sufficiently broad to include even victims of ecological changes".[102] In his opinion, even though the OAU Convention has an expanded definition, the interpretation of the ground is susceptible to a restrictive interpretation.

The number of people displaced by climate disasters has increased in the last decades; nevertheless, the question of how to protect external environmental migrants is still under debate. As argued by Rwelamira, some scholars defend that the broad scope of the 1969 definition could

98 General Assembly of the United Nations. Resolution 3314, 1974. A/RES/29/3314. Available at: http://www.un-documents.net/a29r3314.htm.
99 Mandal, Ruma, 2005, *Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection')*, Legal and Protection Policy Research Series, Geneva: UNHCR Department of Internal Protection. Available at: https://www.unhcr.org/435df0aa2.pdf, p 13, paragraph 33.
100 Edwards, Alice, 2006, *Refugee Status Determination in Africa*, African Journal of International and Comparative Law, vol. 14, no. 2, p. 216.
101 Rwelamira, Medard R.K.,1983, *Some Reflection on the OAU Convention on Refugees: Some Pending Issues*, Comparative and International Law Journal of Southern Africa 16, p. 158.
102 *Ibid,* p.171.

encompass this new category of refugees. Alice Edwards argues that the possibility of fitting the external environmental migrant under the OAU Convention will "depend upon the scope of understanding given to the term 'public order'".[103] A wide range of situations can be attributed to explain the cases of "public order". On the one hand, some believe that the disruption of the public order can be caused by bad administration of the economy by the government or a "severe environmental disaster (whether human-made or natural)".[104] On the other hand, others may believe that public order is related to social and political unrest and it has no connection with natural disasters.[105]

According to Alice Edwards, it is feasible to include people fleeing from environmental disasters in the OAU definition. The main issue remains in the unwillingness of States to accept this broad interpretation of the terms of the definition. She argues that people are frequently given refuge in neighboring States, such as the Congolese that sought refuge in Rwanda after the eruption of Mount Nyragongo in 2002; however, States hardly ever announce that they are accepting refugees following the OAU Convention. Therefore, one can point out the existence of a certain extent of State practice in receiving external environmental migrants under the scope of the OAU Convention, yet it would lack *opinio juris.*[106] The responses of states and international bodies to the situation of environmental disasters delineate whether there is a support or not of a more comprehensive interpretation of this definition.

External environmental migrants are still a non-recognizable category of displaced people with no proper legal instrument to correctly address their situation. However, one can say that the definition of the OAU Convention on refugees opened the way for conferring protection to different types of refugees that were not envisioned in the 1951 Convention. The existence of a legal instrument is not the only possibility for granting protection to EEM. Malcom Shaw argues that "international organizations in fact may be instrumental in the creation of customary law".[107] International Organizations can have a crucial role in the development of the legal protection of people displaced by climate-related events.

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103 Edwards, *supra* note 100, p.226.
104 Mandal, *supra* note 99, at 13.
105 Rankin, Micah Bond, 2005, Extending the Limits or Narrowing the Scope - Deconstructing the OAU Refugee Definition Thirty Years On, South African Journal on Human Rights, vol. 21, no. 3, p. 428.
106 Edwards, *supra* note 100, p. 227.
107 Shaw, Malcom, N., 2008, *International Law,* 6th edition, Cambridge University Press, p.83.

3.2 Cartagena Declaration on Refugees

Latin American countries have a long tradition in dealing with asylum seekers. The Montevideo Treaty on International Penal Law[108] from 1889 was the first legal instrument that mentioned the possibility of asylum for those considered political refugees. This specific type of refugee continued to be the main focus of the several different regional conventions that followed the Montevideo Treaty.[109] For many years those legal documents were able to tackle the problem of refugees in Latin America; however, in the 1960s the region experienced a never-seen phenomenon of intensive population migration within Latin America.

The regional conventions that were created by the American countries to address refugee issues during those decades were mostly focused on people fleeing political repression. The mass migration occurred in Latin America from the 1960s to 1980s posed a challenge to the region as the countries were dealing with different types of refugees. The new refugees from Central America were "mostly rural, ethnically mixed people, who concentrated in remote areas bordering their country of origin".[110] This unique situation of mass migration of people fleeing from generalized violence and oppressive circumstances was what prompted the Central American countries to adopt a regional solution.

Similar to what happened in Africa, Central American governments concluded that the refugee definition of the 1951 Convention was not sufficient to deal with their refugee problem. Inspired by the precedent established by the OAU Convention, which enlarged the refugee definition to address their regional problems, the Central American states gathered to decide what measures could be adopted by them.

In 1984, representatives of ten countries (Belize, Costa Rica, México, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, Panamá and Venezuela) assembled in Colombia for the "Coloquio sobre la Protección de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitários" to discuss the refugee crisis in the region.[111] At the end of the Colloquium, a joint declaration was released to make public the conclusions and recommendations

108 Treaty on International Penal Law, 1889, Adopted by the First South American Congress on Private International Law in Montevideo on 23 January 1889.
109 Arboleda, *supra* note 97, p 198.
110 Arboleda, Eduardo, 1995, *The Cartagena Declaration of 1984 and Its Similarities to the 1969 OAU Convention - A Comparative Perspective*, International Journal of Refugee Law, vol. 7, no. Special Issue, p. 91.
111 *Ibid,* p. 92-93.

decided during the event. The document was proclaimed as the "Cartagena Declaration on Refugees".[112]

It is worth noting that the declaration itself is a non-binding legal instrument. Nevertheless, states adjusted their legislation and policies to steer the framework established in the Cartagena Declaration.[113] Despite its non-binding nature, one might argue that the Declaration acquired the status of regional customary law as states' practice was consolidated in Latin America. As aforementioned, the region has a long tradition of legal rules defining refugees, and the Cartagena Declaration came to confirm the state practices on this topic.

Having the example of the OAU Convention in recent past, the Cartagena Declaration also created a complementary definition of the term refugee. The Declaration included in the definition of refugees of the 1951 Convention any persons who "have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".[114] The Inter-American Commission on Human Rights to the General Assembly of the Organization of American States mostly tailored this definition in the annual report of 1981-1982.[115] The Cartagena Declaration mostly adapted the definition to their current situation due to the existence of numerous civil wars in Central America, mass violations of human rights in the countries dominated by dictatorial regimes, and problems of widespread violence in the region.

The Cartagena Declaration mostly used terms different from the other legal instruments to conceptualize the term refugee. There is no section of the Declaration designated to explain the definition of the terms used such as "generalized violence", "massive violations of human rights", "internal conflicts" and "other events seriously disturbing public order". Likewise, these terms do not have a widely and unique accepted explanation in international law, even though some international institutions or courts of justice might have their definition of some of these terms.

The pragmatic adoption of these terms focused on depicting the reality of events that took place in Central America at that time. The urgency of the situation demanded a rapid approach, and for that reason the concern with formal legal discourse was not the main issue in the elaboration of this document.[116]

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112 Cartagena Declaration on Refugees, *supra* note 8.
113 Mandal, *supra* note 99, p. 15.
114 Cartagena Declaration on Refugees, *supra* note 8, III (3).
115 Annual Report of Inter-American Commission on Human Rights of 1981-82, OEA/Ser.L/V/11.57 Doc. 6, Rev. 1, 20 Sept 1982.
116 Arboleda, *supra* note 97, p. 204.

The Cartagena Declaration intended to curb refugee protection by limiting the use of the objective criteria; the simple indication of the concrete existence of one the five grounds listed in the definition was not considered enough.[117] The concession of refugee status is not bounded only by the occurrence of one of the five grounds of the definition; it is also imperative that the person should have fled "because their lives, safety or freedom have been threatened". In other words, the two conditions must meet so that the person fleeing can fit under the refugee definition of the Cartagena Declaration.[118]

As an example of what happened in Africa, after some decades the plight of the refugee in Central America has changed and evolved to a different context. The influx of mass migration significantly diminished throughout the years, but despite that fact, the Cartagena Declaration did not transform into an archaic regional document. Decade after decade, Latin American countries still reiterate the relevance of this document to the region and to the refugee regime.

In 2004, governments of Latin American countries issued the "Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America". Even though 20 years had passed since the release of the Cartagena Declaration, the interpretation of the terms of the definition remained a hindrance. The Mexico Declaration expressed the need for clarifying and specifying the criteria for the interpretation of the five grounds. This could solve the problems concerning the scope of applicability of the definition with the purpose of consolidating state practice.[119]

Ten years later, these same countries celebrated the thirtieth anniversary of the Cartagena Declaration on Refugees. The governments of the countries of Latin America and the Caribbean issued, in 2014, the "Brazil Declaration".[120] This declaration highlighted that the Cartagena refugee definition had been widely adopted in the national legislation of the countries and, at the same time, emphasized the changes in the causes of forced displacement which shifted to situations such as transnational organized crime, climate change, and natural disasters.

The mass influx of migrants due to the consequences of natural disasters and climate change effects was an addendum as it was never mentioned before by the previous declaration. Migration caused by environmental changes or disasters was not on the main list of causes for displacement of

117 Edwards, *supra* note 100, p. 230.
118 Arboleda, *supra* note 110, p. 90.
119 Regional Refugee Instruments & Related, Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America, 16 November 2004, available at: http://www.refworld.org/docid/424bf6914.html [Accessed 12 July 2018], Chapter 1.
120 Regional Refugee Instruments & Related, Brazil Declaration and Plan of Action, 3 December 2014, available at: http://www.refworld.org/docid/5487065b4.html [Accessed 13 July 2018].

people in Latin America. However, in 2010, a strong and destructive earthquake in Haiti caused an unexpected migration crisis in the region. Many Haitians fled to other countries of Latin America to seek refuge as the earthquake destroyed the already under-resourced cities of this country. A considerable number of people crossed international borders to seek asylum in nearby countries like Ecuador and Brazil as a consequence of this natural disaster.[121]

This situation might explain why a broader definition is so important to tackling the issue of external environmental migrants. The Haitian migrants entering Brazil at that time asked to receive refugee status. However, Brazilian authorities declared that these displaced persons did not fit the status of refugees neither under the 1951 Convention nor under the grounds of "circumstances which have seriously disturbed public order" present in the Cartagena Declaration.[122] Instead, they were granted humanitarian visas. Once again, one can observe that there was the possibility of interpreting the prospect of granting protection to the external environmental migrants, and with that, States chose to make a restrictive interpretation of this term.

The situations, therefore, that caused the plight of refugees in Africa, and Latin America changed from when these regional instruments were envisioned. It is unquestionable that the advent of those particular instruments broadening the definition of the term refugee were milestones in acknowledging that the 1951 Convention was not able to address all problems of refugees. Even though the 1951 Convention remains the primary international treaty in the field of refugee law, these new regional instruments allowed the international community to rethink the need of handling forced migration caused by new circumstances such as climate change and natural disasters.

121 Fagen, Weiss Patricia, 2013, *Receiving Haitian Migrants in the Context of 2010 Earthquake,* Georgetown University. Available at: https://environmentalmigration.iom.int/receiving-haitian-migrants-context-2010-earthquake [Accessed 13 July 2018], p. 14.
122 *Ibid,* p.15.

Chapter Four: The Kiribati Case

After thoroughly scrutinizing the main instruments of the refugee regime, the author will analyze judicial decisions concerning individuals requiring refugee status under the arguments of displacement caused by climate change-related events. This chapter will be dedicated to the case study of a particular judicial decision taken by the Immigration and Protection Tribunal of New Zealand against a claim by a citizen of the island of Kiribati. Before going through the specific details of the case, some considerations about the state of Kiribati are essential to understanding the whole context.

The state of Kiribati is an island group situated in the Central Pacific Ocean and it is composed of 32 atolls and one raised coral island. The main economic activities of the population are focused on the production of copra and fishing export. Tourism also represents an important source for the economy of the country.[123] The most important feature of Kiribati, however, is the effects of climate change in the country's living conditions.

Kiribati is a low-lying state. The government states that climate changes will impact the lives of the citizens of the islands. Scientific projections predict that the temperature, the sea level, and the ocean acidification will continue to rise, for instance.[124] Predictions indicate that the islands will be submerged in the next decades, although Kiribati could become an uninhabitable place before that due to water shortage.[125] Given that brief context about the situation of concern for Kiribati, the next step is an overview of the case law and the analysis of the applicability of the Refugee Convention to this situation.

In 2013, a judicial decision declining Ioane Teitiota's refugee protection attracted the attention of international media[126] and legal journals. Teitiota required the recognition of his status of "environmental refugee" based on environmental changes in his home country, Kiribati, caused by the effects of climate change.[127] He was constantly mentioned as the first possible "climate

123 Kiribati Climate Change, About Kiribati. Available at: http://www.climate.gov.ki/about-kiribati/ [Accessed 18 March 2019].
124 Kiribati Climate Change, Future Climate. Available at: http://www.climate.gov.ki/future-climate/ [Accessed 18 March 2019].
125 Ni, *supra* note 74, p. 332-334.
126 Several international newspapers published about this case. See more in: The Telegraph https://www.telegraph.co.uk/news/worldnews/australiaandthepacific/kiribati/10474602/Kiribati-climate-change-refugee-rejected-by-New-Zealand.html; Brookings https://www.brookings.edu/blog/planetpolicy/2014/08/13/no-climate-refugees-in-new-zealand/; Independent: https://www.independent.co.uk/news/world/australasia/world-s-first-climate-change-refugee-has-appeal-rejected-as-new-zealand-rules-ioane-teitiota-must-9358547.html.
127 Immigration and Protection Tribunal of New Zealand, New Zealand v AF(Kiribati), 2013, [2013] NZIPT 800413.

refugee" as his case presented the first occasion that two appellate bodies decided on similar claims.[128]

Teitiota was born on one of the atolls of the Republic of Kiribati. During his teenage years, he moved to the capital, Tarawa. He married in 2002 and moved in to live with his parents-in-law. He described the occurrence of several environmental hazards such as regular floods, salinization, the rise of sea-level and other situations that made living conditions in Kiribati extremely harsh. The various information provided by media and other sources about the future impossibility of living in Tarawa prompted Teitiota and his wife to emigrate to New Zealand in 2007.[129] After his work visa expired, he and his wife remained in New Zealand without legal status. In 2011, he was stopped at a traffic stop and arrested for being unlawfully in the country. As the deadlines for requesting a visa extension was already due, his new lawyer, Michael Kidd, accepted his case. He decided to apply for a refugee visa.[130]

In 2013, the Immigration and Protection Tribunal of New Zealand decided Teitiota's appeal against a negative decision by a Refugee and Protection Officer that declined refugee status or protected person status to Teitiota. He required, therefore, to be recognized as a refugee under the 1951 Convention or to receive protected person status according to New Zealand's protected person law. The New Zealand Immigration Act 2009 uses the definitions of the 1984 Convention Against Torture and of the International Covenant on Civil and Political Rights to asses if the person would suffer with torture, arbitrary deprivation of life or cruel treatment in case of deportation from New Zealand.[131]

Mr. Kidd argued that the appellant, Teitiota, should be considered as an IDP according to the terms of the Guiding Principles on Internal Displacement, and, for this reason, he would have the right to claim refugee status in New Zealand. The judge of the case asserted that regardless of whether the person was once an IDP, this fact does not guarantee the refugee status. Besides, he added that Teitiota could not even be considered as an IDP according to the Guiding Principles as his movement within Kiribati was a "voluntary adaptive migration".[132]

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128 Ni, *supra* note 74, p. 336.
129 New Zealand v AF(Kiribati), *supra* note 127, at [23]- [29].
130 Weiss, Kenneth R., 21015, *The Making of a Climate Refugee,* Foreign Policy. Available at: https://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/ [Accessed 07 August 2018].
131 Immigration Act 2009, New Zealand Legislation, Available at http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440799.html [Accessed 27 March 2019]. Section 130 and131.
132 New Zealand v AF(Kiribati), *supra* note 127, at [45] – [49].

a) The internal displacement argument

This first argument used by the appellant is not valid. First of all, GPID is an instrument of soft law. This nomenclature of "law" does not imply that this sort of document described as soft law is considered as proper law. They might be important instruments to influence international politics, for instance, but they do not constitute lawful documents. Soft law can be transformed into a legal norm with the formalization of a binding treaty or by acceptance as a customary rule.[133] In the case of the Guideline Principles, this document is still considered as a soft law instrument.

As described in chapter two, some features must be present to define someone as an internally displaced person. The most essential characteristics of IDP is that the person must not have crossed an international border, in other words, the displacement must have happened within the country. In Teitiota's case, he was living in New Zealand, so he had already crossed an international border and could not be described as an IDP in any sense. In fact, the Refugee Convention is the legal instrument that requires that the person must be outside their country of nationality. In this aspect, Teitiota meets the criterion of the Convention as he had already been living in New Zealand by the time he filed for refugee status.

Another central point of the IDP definition is that persons must have been forced or obliged to flee due to specific reasons (natural or human-made disasters are included among them). It is generally accepted that the interpretation of the IDP definition can encompass natural disasters linked to climate change.[134] However, these cases of climate change displacement are usually caused by the effects of sudden-onset disasters which forces people to displace within their countries. In Teitiota's situation, Kiribati is undoubtedly suffering from the effects of climate change, but the situation did not reach such an irreversible point as to make the living conditions in the region impossible and, consequently, to force people to move elsewhere. To sum up, Teitiota cannot be considered an IDP because he was not forced to move.

b) The actor of persecution argument

The "well-founded fear of being persecuted" is another key component of the definition of refugee. As mentioned previously, the act of persecution requires an actor. However, the argument

133 Shaw, *supra* note 107, p. 117-118.
134 Chairperson's Summary, *supra* note 59, paragraph 19.

used by Mr. Kidd relies on the idea that persecution does not require a human agency.[135] He attributed the responsibility of rising sea levels and the change of weather patterns to the greenhouse gases. In his words, this would constitute an indirect but global "human agency".[136] The judge refuted the argument as he argued that the legal concept of "being persecuted" requires human agency, hence the agents of persecution can only be a state or a non-state. [137]

The 1951 Convention refers to the passive position of the refugee as the victim of persecution. It requires that someone must be the agent of persecution and it can be an act of a state or non-state actor. In this sense, the state should be unable, negligent or could have refused to offer protection to the citizen. The government of Kiribati is not neglectful in its duties,[138] in fact, it has been adopting several measures to protect their citizens from further climate change effects.

In the case analyzed, it is possible to affirm that the state of Kiribati did not fail to protect its citizens. On the contrary, the government of Kiribati had already bought private lands in Fiji to reallocate people in the future, despite the limited capacity to buy foreign lands. Another measure was to develop a program to enable people to train specific skills that might help them to find a job in other countries.[139] Arguably, it is not possible to assert that the government of Kiribati or its agents failed to protect Teitiota. Nor can one say that they are unable or unwilling to protect him. Even though one cannot claim that the government of Kiribati is able to provide help to every single one of its citizens, the measures adopted by the State are crucial to proving the significant efforts made by the government to protect its population.

The judge defended that environmental degradation, associated with climate change or not, could fit under the scope of the Refugee Convention in certain situations despite the "requirement of some form of human agency" to characterize persecution.[140] The judged emphasized that several courts of justice have decided that people fleeing natural disasters are not entitled to protection under the 1951 Convention. However, he stressed that the interrelation among natural disasters, environmental degradation, and human vulnerability to these circumstances is complex. This complex relationship may open routes to the application of the international protection regimes in some circumstances.[141]

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135 New Zealand v AF(Kiribati), *supra* note 127, at [51].
136 In the High Court of New Zealand Auckland Registry, 2013 Ioane Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment, [2013] NZHC 3125, at 40 (c).
137 New Zealand v AF(Kiribati), *supra* note 127, at [54].
138 McAdam, Jane, 2015, *The emerging New Zealand jurisprudence on climate change, disasters and displacement*. Migration Studies, 3(1), p. 134
139 Weiss, *supra* note 130.
140 New Zealand v AF(Kiribati), *supra* note 127, at [54] - [55].
141 New Zealand v AF(Kiribati), *supra* note 127, at [57].

It is worth mentioning that the most important feature of the judge's decision relies on the fact that he recognized that "while in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case".[142] The requirements of the Refugee Convention are very specific and restricted for a reason. One can conclude from different court decisions[143] that the claims of refuge based solely on climate change reasons will be accepted by States with difficulty. Nevertheless, one cannot say that this will never happen as new interpretations or definitions of refugee may appear in the next decades, as has already occurred with the cases of the OAU Convention, and the Cartagena Declaration.

c) The well-founded fear of persecution argument

Another important point is to analyze the definition of persecution. It is important to comprehend the extent of actions that can be considered as persecution. One concept that is widely accepted in countries like Canada, New Zealand, and the United Kingdom is the definition tailored by James Hathaway in which he claims that sustained or systematic violation of basic human rights and the failure of the state to protect can define persecution.[144] However, which human rights could be included in this category?

The Refugee Convention in its preamble refers to the Universal Declaration of Human Rights from 1948.[145] The human rights cited in the UDHR were later transformed into two binding treaties: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[146] The human rights enunciated in these documents can also suffice for persecution claims. Mr. Kidd rightfully referred to some rights described in the ICCPR in Teitiota's refugee claim. However, the mere violation of a human right does not guarantee refugee status.

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142 New Zealand v AF(Kiribati), *supra* note 127, at [64].
143 See some examples of decisions: Refugee Appeal No 72315 [2000] NZRSAA 493 (19 October 2000), Refugee Appeal No 72185 [2000] NZRSAA 335 (10 August 2000), Refugee Appeal No 72179 [2000] NZRSAA 385 (31 August 2000), Refugee Review Tribunal of Australia 0907346 [2009] RRTA 1168 (10 December 2009)
144 Refugee Appeal No. 74665, No. 74665, New Zealand: Refugee Status Appeals Authority, 7 July 2004, available at: http://www.refworld.org/cases,NZLRSAA,42234ca54.html [Accessed 13 August 2018].
145 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [Accessed 21 November 2018].
146 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

According to Jane McAdam, it is very difficult to fit "climate change" into the concept of persecution. The breach of human rights must be "sufficiently serious" due to its nature or the number of repetitions. She concludes by arguing that "although adverse climate impacts such as rising sea-levels, salinization, and increases in the frequency and severity of extreme weather events (e.g. storms, cyclones, floods) are harmful, they do not meet the threshold of 'persecution' as this is currently understood in law".[147] To sum up, describing climate change as a type of persecution is unlikely.

The New Zealand judge focused on certain objective arguments to rule on Teitiota's refugee claim. The first is the real chance of persecution upon his return to Kiribati. The judge recognized the plight of the population and the possibilities of conflicts triggered by environmental degradation and natural disasters in Kiribati as credible evidence. However, in his assessment, Teitiota did not show enough proof that he would suffer any serious harm upon his return to Kiribati, and, hence, he could not be considered as a refugee.[148] One of the main features of a claim for refuge is that the possibility of persecution exists in the case of return to the country of origin. In this case, it is not possible to show the connection between Teitiota's return and the possibility of his persecution. He would surely face harsh living conditions if he returned, however there was no feasible fear of him being persecuted upon his return to Kiribati.

Nevertheless, even if the appellant could demonstrate that there was persecution, he would still have to prove that the fear of being persecuted was a well-founded fear. The refugee must be able to prove that his or her fear is real, not an exaggerated concern. Teitiota described the delicate situation of the people of Kiribati, nevertheless environmental degradation was not exclusively affecting him. In fact, the whole community suffered from the side effects of climate change. If he wanted to claim that he would face serious harm by returning to Kiribati, he should have pointed out cases of relatives or people in his same situation who might be living in an insufferable situation. The reality is that he still had many relatives leaving in Kiribati, which only corroborates that his fear was not "well-founded".

147 Mc Adam, Jane, 2010, *Climate Change Displacement and International Law,* Side Event to the High Commissioner's dialogue On Protection Challenges, p.2.
148 New Zealand v AF(Kiribati), *supra* note 127, at [72] – [74].

d) The five grounds argument

The second argument used by the judge to definitively refute the refugee claim was that the persecution needs to be based on one of the five grounds of the Convention. The judge affirmed that the effects of environmental degradation on the living standard were impacting not only Teitiota, but the general population of Kiribati as the appellant himself admitted.[149] The appellant did not suggest the motivation of why the Government failed to take adequate measures to protect him, and, for that reason, his claim lacked base on any of the five Convention grounds.

It is hard to see a connection between environmental degradation and one of the five grounds. Nevertheless, some people point out that external environmental migrants can be persecuted for the reason of membership of a social group. These groups would be formed by persons without political power to protect their own environment. Jessica Cooper argues that "environmental refugees are members of this social group; it is because of this membership that they are subjected to the environmental degradation that their government promotes".[150]

Teitiota might be part of this social group described by Jessica Cooper with no political power to protect their environment; however, one cannot argue that the Kiribati government is promoting environmental degradation. The government is "doing whatever it can do to mitigate the impacts of climate change and disasters".[151] This argument used by Jessica Cooper to explain the applicability of the term "membership of a particular social group" to environmental situations is a narrow interpretation, which is not widely accepted by international organizations or scholars. Generally, scholars agree that environmental degradation does not constitute one of the five grounds of the Convention. Mr. Kidd deliberately did not mention this line of argumentation in his claim as it would be difficult to prove this point.[152]

The Tribunal of Australia judged a similar case in which the appellant from Kiribati claimed to be part of a particular social group. The judge of this case argued that "while it has been submitted that the applicant can be considered a member of a potential range of social groups, including those from Kiribati, or those from Kiribati who have lost the ability to earn a livelihood or those fleeing their homes for environmental reasons in the Tribunal's view, this does not assist the applicant, because the Tribunal does not believe that it is possible to identify any agent of persecution who or which can be said to be undertaking actions which harm the applicant for

149 New Zealand v AF(Kiribati), *supra* note 127, at [75].
150 Cooper, *supra* note 76, p. 529.
151 McAdam, *supra* note 138, at 134.
152 Ni, *supra* note 74, p. 355.

reasons of membership of any particular social group." (emphasis added). To sum up, all the elements of persecution must be present to be considered as a refugee, which was clearly not the case with Teitiota.

Finally, after the appellant arguments were rejected, he appealed to the High Court and to the Supreme Court of New Zealand. The superior tribunals all agreed that the Teitiota failed to fall under the scope of the Convention. Nevertheless, they all acknowledge that persons displaced because of environmental degradation caused by climate change can "create a pathway into the Refugee Convention" in appropriate cases.[153]

This analysis of Teitiota's case under the scope of the 1951 Convention demonstrates that the tribunals of New Zealand were accurate in denying refugee status to Teitiota. However, even if in this case the court did not consider Teitiota as a refugee under the conditions and arguments presented by him, this does not mean that it is impossible that a claim based on climate change-related events would pass. States and international organizations are very cautious to admit a broader interpretation of the refugee definition of the 1951 Convention. The consequences of this action might entail more responsibilities for the international community.

4.1 Analysis under the OAU Convention and Cartagena Declaration

Teitiota does not fit under the refugee definition of the 1951 Convention as already argued above. However, would he fit under the definitions of different legal instruments if they were applicable? The OAU Convention and the Cartagena Declaration are two landmarks in giving new perspectives for the universal refugee definition. According to norms of international law, these two regional documents would not apply to Teitiota's situation as the first one is a regional legal instrument only valid to states parties, and the second is considered soft law. Nevertheless, the focus of the analysis is to define whether Teitiota would be a refugee according to different definitions. Chapter three already presented in detail the definition and characteristics of these two instruments. The author will begin by analyzing the applicability of Teitiota's situation under the OAU Convention.

The OAU Convention was developed in a social and historical context distinct from the 1951 Convention, and this difference is noticed in its refugee definition. The OAU Convention

153 Supreme Court of New Zealand, Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment, SC 7/2015, [2015] NZSC 107.

emerged in a post-colonial framework and because of that this document contains terms such as "external aggression", "occupation", and "foreign domination". Arguably, these elements of the OAU Convention definition would not be applicable to the case of external environmental migrants. However, there is a fourth term that might be suitable: the term "events seriously disturbing public order". As there is no universal definition of the meaning of events disturbing the public order, the interpretation of this term is more flexible and open to different analysis.

Walter Kälin described five scenarios in which it is possible to envision a connection between the effects of climate change and forced displacement. If we take into consideration these five situations, it would be possible to fit external environmental migrants within the OAU description of refugee. Sudden-onset disaster is one of the situations in which one could visualize the application of the OAU Convention. In the aftermath of environmental disasters, the degree of destruction of the country may prompt people to escape to a neighboring country. Alongside with the level of destruction, other factors (i.e., political instability) might contribute to disturbing the public order seriously, and, in this case, the person fleeing could fit under the OAU Convention. Another situation that can interfere in the public order is the lack of an essential resource as water. In all these scenarios, it is possible to conceive the application of the OAU Convention. However, Teitiota moved to New Zealand neither because of a sudden-onset disaster nor due to the scarcity of natural resources. His displacement was a case of slow-onset environmental degradation, and more specifically the so-called "sinking state".

The movements of people from "sinking states" is generally gradual. The state will not suddenly disappear, so the possible scenario is that the population will gradually move to other countries because of the increasing impossibility of living in those places. In this situation, it is hard to describe if there is a severe disturbance of the public order. This is precisely the problem of Teitiota; he was not forced to move to New Zealand. He anticipated that he might have problems in the future and decided to move to seek better living conditions. Therefore, it would not be possible to define Teitiota as a refugee under the OAU Convention.

It is worth highlighting that the stance to encompass external environmental migrants within the definition of the OAU Convention is not generally accepted, especially by the states parties themselves. Alice Edwards mentioned the case of Congolese fleeing to Rwanda in the aftermath of a volcanic eruption. The people from Congo could be considered as external environmental migrants; however, states do not seem willing to apply the OAU refugee definition in these

circumstances. Most of the times, these people are accepted in other countries based on humanitarian reasons, not under the terms of the OAU Convention.[154]

A substantial difference from the 1951 Conventions is that the OAU Convention does not require the subjective criterion of "well-founded fear of being persecuted". For this reason, the steps to receive a refugee status should be less complicated in Africa because anyone fleeing based on one of the grounds of the OAU definition can receive refugee status without having to satisfy a subjective criterion. Some courts already argued that the refugee definition of the OAU Convention could fit the case of external environmental migrants in some situations. For instance, the Tribunal in Australia agreed that the OAU Convention "focuses less on the motive for flight than the Refugees Convention and may encompass flight from natural or environmental phenomenon".[155] The need to prove just the objective criterion in the OAU Convention would make it easier for the refugee claims of external environmental migrants. The interpretation of the refugee definition could change to include EEM in the future, it will depend mostly on the willingness of the states.

The second instrument that will be used to analyze the Teitiota claim as a refugee is the Cartagena Declaration. This instrument was also relevant to demonstrate the need to extend the scope of the universal refugee definition. As a mere declaration agreed upon between states, this instrument is not legally binding. Nevertheless, it is an instrument of soft law capable of influencing international politics. Besides, since the Cartagena Declaration was published, several Latin American countries have incorporated this definition into their domestic legislation.

The definition of the Declaration imposes that to be considered a refugee two criteria must be met. The person must show the cause of the displacement and the reason for that. The document describes three causes: threats to safety, life, and freedom. The reasons for fleeing are fivefold: generalized violence, foreign aggression, internal conflicts, massive violation of human rights, and circumstances seriously disturbing the public order. Would Teitiota fit in these two criteria? As already proven, there was no real and imminent threat to Teitiota's life if he returned to Kiribati. Surely, his living conditions were better in New Zealand, but his safety, life, and freedom are not under any severe menace in Kiribati. Also, his situation does not fit any of these five grounds as already argued above. The effects of climate change will take place in Kiribati in the next decades, but, at the moment, the circumstances are not so extreme as to provoke a disturbance of the public order as an example of what might happen with sudden-onset disasters.

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154 Edwards, *supra* note 100, p. 227.
155 Refugee Review Tribunal of Australia 0907346 [2009] RRTA 1168 (10 December 2009), at 53. Available at: http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/RRTA/2009/1168.html.

These two legal instruments have many aspects in common. They were both created in a framework of crisis, and because of that, the main concern was to cope with the main issues occurring in these areas. However, the most relevant feature of these documents was to prove that the universal Refugee Convention of 1951 is not able to encompass different situations involving refugees.

4.2 Summary of findings

Three legal instruments were used to analyze the refugee claim of Teitiota. Mr. Kidd based reasoning on the argument that Teitiota was an environmental refugee. The New Zealand courts rejected his claims in every appeal decision. The three legal documents depict different definitions of refugees. They may have similar aspects, but they also have unique characteristics. By analyzing the case of this individual fleeing his country of nationality, Kiribati, in light of these instruments some findings were reached.

The first consideration is that there are limited possibilities to fitting a person displaced by climate change-related events into the refugee definition of the 1951 Convention. Several environmental situations can prompt persons to displace within or outside their country of origin. The effects of climate change can take a long or short time to be perceived by the population. The fact is that each one of these circumstances can entail a different response in international law. For that reason, it is so hard to fit every person displaced by environmental issues in a unique category. The field of climate change is still in development, and much study is still required to understand the causes, consequences, and relation of environmental events and displacement.

The second important consideration is the gap in protecting people fleeing in situations induced by climate change-related movements. The analysis of Teitiota's case under the three different definitions presented by these milestones of the refugee regime proves that argument. None of the three legal instruments studied in the present thesis were able to comprehend the protection of Teitiota fully. He would not be a refugee under any of these instruments, and he is also not an IDP. The general conclusion is that there is no universal instrument capable of tackling his situation because "people like Mr. Teitiota do not find any solutions in international law as it presently stands. The solution for especially slow-onset environmental issues, such as sinking islands, or low lying coastal lands that are being slowly eroded and overcome because of climate

change-induced factors, don't have a framework".[156] To sum up, refugees, migrants, and IDPs are the objects of protection of international organizations, but the external environmental migrants do not have any international governmental organization dealing with this specific issue-area.

The third conclusion relies on the importance of understanding the terms used in the description. A common feature of the three documents is the lack of a universal or agreed definition of the terms used in the conceptualization of refugee. These terms are the core of these three instruments. The main issue is that without a single definition or interpretation of each one of these terms, the comprehension is subjected to the willingness of states. States actions will determine a narrow or broad interpretation, and this might jeopardize the protection of these individuals fleeing their countries.

The main finding is that Teitiota certainly does not fit the description of a refugee. He is not in danger of being persecuted upon his return to Kiribati, nor is the government unable or unwilling to protect him. Even if one cannot identify the human agency of the Kiribati government in this particular case, we cannot dismiss that environmental degradation can be used as a tool of oppression and influence by governments. In some cases, it is possible to envision a connection between environmental events and persecution. The Iraqi Marsh Arabs are a great example of how government actions over environmental issues may prompt people to flee. The Iraqi government increased the efforts to drain the marshlands where the Marsh Arabs lived after an abortive uprising against the government. The actions adopted by the Iraqi government deeply affected the living conditions in the areas, which forced people to flee to neighboring countries like Iran.[157]

Teitiota, however, cannot be considered as a refugee according to the refugee definition of the 1951 Convention, and the other two legal documents. Despite that fact, other cases of external environmental migrants might fit under the refugee regime in certain concrete situations.

156 UN NEWS, 2014, François Crépeau in *Feature: Should International Refugee Law Accommodate Climate Change?,* Available at: https://news.un.org/en/story/2014/07/472372 [Accessed 19 March 2019].
157 Human Rights Watch, 2003, *The Iraqi Government Assault on the Marsh Arabs, A Human Rights Watch Briefing Paper,* Available at: https://www.hrw.org/legacy/backgrounder/mena/marsharabs1.pdf, [Accessed 14 August 2018].

Chapter Five: The Tuvalu Case

The general context of the Tuvalu situation is very similar to the Kiribati case: families that required refugee status because they were coming from low-lying states which are already suffering from the effects of climate change. The Kiribati case preceded the Tuvalu one, and, as such, the former influenced the outcome of the latter.

The same tribunals analyzed the Kiribati and Tuvalu case, but the outcome was different for the latter. What could have changed just one year after two courts of appeals denied Teitiota's claim? This chapter will analyze the Tuvalu case to understand the underlying differences between these cases. As with the Kiribati case, the Tuvalu case will be analyzed under the three instruments of the refugee regime studied in this thesis.

Some relevant features must be described to understand the historical and social context of the state of Tuvalu. The country consists of nine coral atolls[158] and is a low-lying island state. Studies have already shown that the country will be deeply affected by the consequences of climate change. Tuvalu suffers from similar environmental degradation to Kiribati. The most common effects of climate change will be related to coastal erosion, flooding and inundation, water stress, destruction to primary sources for subsistence, and damage to individual and community assets.[159] This brief overview of the current and future situation of the state of Tuvalu is vital to understanding the claims made by the appellants in the Tuvalu case law.

In 2014, a couple from Tuvalu living in New Zealand, appealed against the decisions of a refugee and protection officer that declined them refugee status. The husband and the wife were born in Tuvalu but on different islands. The husband used to teach, while the wife also worked for a couple of years as a teacher's aide before the school was closed due to lack of funds. Shortly after that, she met the husband when he moved to her hometown to teach. They got married and moved to accommodation rented from the Ministry of Education. The wife got pregnant on two different occasions, but she lost both babies in the late stages of gestation.[160]

After moving to New Zealand, they had children. However, these bad experiences made her fear for the life of their children if they were forced to return to Tuvalu. According to the wife, Tuvalu does not have proper medical facilities, and medicine is often not available. Besides, the

158 United Nations Office for the Coordination of Humanitarian Affairs, *Tuvalu*, Available at: https://www.unocha.org/office-pacific-islands/tuvalu [Accessed 25 March 2019].
159 Immigration and Protection Tribunal New Zealand, 2014, AC (Tuvalu), [2014] NZIPT 800517-520, at [14] – [15].
160 *Ibid,* at [21] – [31].

general living conditions of Tuvalu are another major concern. They have nowhere to go there, as they have neither a house nor a land. The husband has no relatives living in Tuvalu, and the wife has some family members but they are not working, hence not able to support them. They also show concern about the effects of climate change on their lives in Tuvalu as they noticed significant changes in their hometown islands. The frequent inundations make plantation hard; the low quality of water is another obstacle to life in Tuvalu. These are just some of the situations that they might face if they needed to return to their country.[161] These were the main facts presented by the couple in their appeals. They required to be recognized as refugees, or to receive protected person status according to the New Zealand protected person law.

The judge of the Tuvalu case took into consideration the recent decision of the Kiribati case in his assessment. The magistrate acknowledges that there is no basis for the appellants' requirement of refugee status. Regardless of the harm that they may face upon their return to Tuvalu, their claims do not have any connection with one of the five grounds of the Refugee Convention. The judge followed the position adopted in the Kiribati case about the inapplicability of the Refugee Convention in the context of natural disasters.[162]

In the Tuvalu case, the lawyer submitted the claim that the appellants should be recognized as refugees. However, after the publication of the Kiribati decision, the appellants decided to abandon this claim. During the hearing, the Tuvaluan family admitted that there was no legal basis for the claim of refugee as none of the five grounds were present in the situation.[163]

The analysis of this case under the Refugee Convention is mostly the same as argued in the Kiribati case. The Tuvalu case met the criterion of being outside the country of nationality, but as already argued this reason alone does not amount to refugee recognition. Other key elements as the persecution and the five grounds must be taken into consideration as well.

Regarding the persecution element, once again it is not possible to identify an agent of persecution. It was widely demonstrated in the judicial decision that the Tuvalu government is adopting several different measures to minimize the effects of climate change on the life of the population. In this sense, one cannot claim that there is an act of persecution from the government or that the state neglected its duties. Nevertheless, the mere existence of persecution is not enough to fulfill the requirements of the refugee definition; the persecution must be grounded on one of the five reasons described in the Convention. In this case, it is also not possible to identify that the

161 *Ibid,* at 31 [31] – [33].
162 AC (Tuvalu), *supra* note 159, at [45]- [46].
163 Mc Adam, *supra* note 138, p. 133.

persecution would be based on one of the five grounds of the Convention. The appellants were also aware of this impossibility for that reason that they decided to discard this argument.

The Tuvalu case did not bring any new circumstance capable of changing the understanding of the tribunals about the refugee claims based on climate change arguments. Hence, there is no possibility to recognize the appellants as refugees according with the refugee definition of the 1951 Convention.

It was already defined that the appellants of Tuvalu could not fit the Refugee Convention definition. Would they be able to fit the definition of the OAU Convention and the Cartagena Declaration? The same analysis used for the Kiribati case regarding the application of the refugee definition of the OAU Convention and the Cartagena Declaration would be applicable in this case. As observed, the term from both refugee definitions that could fit the situation of external environmental migrants is the events seriously disturbing the public order. However, the appellants decided to move from Tuvalu to New Zealand not because of any serious event disturbing the public order. On the contrary, their movement was executed without any immediate urgency as there was not an immediate danger to their lives if they remained in Tuvalu. It was just a case of voluntary movement. In this sense, they could not be considered as refugees according to these two other documents.

a) The protected person argument

Since the claim of refugee status was abandoned by the appellants the analysis remained focused on the protected person argument. The magistrate proceeded to analyze the argument of the appellants as protected persons under the domestic legislation of protected person law based on the ICCPR. International human rights law was able to extend the obligation of states to protect people. The human rights documents are generally described as complementary protection "to that provided by the Refugee Convention".[164] The counsel of the case argues that the appellants are subjected to the possibility of suffering arbitrary deprivation of life or cruel, inhuman or degrading treatment in Tuvalu, which are some of the human rights protected in the ICCPR.

One of the main arguments of the lawyer was that the assessment of the judge should focus on the ability or willingness of the Government of Tuvalu to alleviate the harm, not in the cause of harm (climate change). Also, the relevance should not be in the fact that climate change in Tuvalu is

164 Mc Adam, *supra* note 138, p. 135.

a slow-onset process but in the severity of the harm. Nevertheless, the Tribunal rejects the irrelevance of timing attributed by the lawyer. The harm must exist at the time the claim was made which was not that case of the appellants as the effects of the climate change are slowly affecting Kiribati. However, the judge also defended that the assessment of the danger in situations of anticipated harm in the context of a slow-onset process must be evaluated case by case. It will depend on the particular situation showed in these claims.[165]

The Tribunal agreed that the state must account for positive obligations to protect the right of life of its population from risks stemming from environmental hazards (human-made or natural disaster). The failure to provide protection amounts to an omission under the principle of the prohibition on the arbitrary deprivation of life. In other words, Tuvalu has the obligation and the capacity to adopt certain measures to reduce the risk from well-known environmental hazards with pre and post responses. Nevertheless, the Tribunal believes that "it is simply not within the power of Government of Tuvalu to mitigate the underlying environmental drivers to these hazards. To equate such inability with failure of state protection goes too far. It places an impossible burden on a state".[166]

The Tuvalu government has adopted several measures to tackle the effects of climate change on its population's livelihood. In 2017, Tuvalu launched a coastal adaption project to improve coastal protection in some of the most populated islands of the state.[167] Other projects were also created to cope with the effects of climate change in Tuvalu,[168] hence one can say that the government adopted positive obligations aiming to protect the right of life of the Tuvaluan population. The actions of states like Tuvalu and Kiribati can enhance the quality of life of its populations, however, the full responsibility for halting climate change is not restricted to these countries. They wouldn't be able to do it even if they wanted to. The international community should recognize that a collective effort is necessary to cope with the effects of climate change.

The judge also analyzed the submission of the lawyer to be considered as a protected person under the scope of the prohibition on cruel, inhuman, or degrading treatment or punishment. The judge mentioned that the state has some positive obligations in situations of disasters, and if the

165 AC (Tuvalu), *supra* note 158, at [53]- [58].
166 AC (Tuvalu), *supra* note 159, at [75].
167 United Nations Development Programme, 2017, Government of Tuvalu Launches New Coastal Protection Project to bolster Resilience to Climate Change, Available at: https://www.adaptation-undp.org/government-tuvalu-launches-new-coastal-protection-project-bolster-resilience-climate-change [Accessed 25 March 2019]
168 United Nations Development Programme, Tuvalu, Available at: https://www.adaptation-undp.org/explore/polynesia/tuvalu?page=1 [Accessed 25 March 2019].

state failed to act in certain ways, it might constitute a treatment. The discriminatory denial of available humanitarian relief is one example of what may constitute a treatment.[169]

Based on this general analysis of the international law norms, the judge believed that the lives of the appellants would be more difficult in Tuvalu regarding economic aspects. Nevertheless, there is no consistent argument to support that the appellants would be in real danger of being deprived of their lives if they returned to Tuvalu. In addition, the Tribunal declared that there was no evidence that the government of Tuvalu is not taking measures to protect its citizens from environmental hazards. The judge pointed out some reports that were published describing several initiatives of Tuvalu's government to assist and improve the lives of the population[170].

The Tribunal also decided that there is no danger of the appellants being victims of cruel treatment. No evidence was found of the failure of the state in protecting its citizens. In fact, the Tuvalu state is actively pushing the international community to further commitments on climate change issues. For all the aforementioned reasons, the Tribunal decided to dismiss the claims of the appellants.

b) The humanitarian visa

After the rejection of their claims, the appellants filed a humanitarian appeal against this decision. They used mostly the same arguments of being protected persons, but they added to the humanitarian appeal the fact that their deportation to Tuvalu would separate them from their family as all the husband's relatives, including his own mother, were living in New Zealand. In addition, they defended that they would suffer from the negative impacts of climate change in Tuvalu along with socio-economic deprivation. The husband presented several pieces of evidence to prove that he and his family have a close connection with their relatives living in New Zealand. Their children were born in New Zealand and have never been to Tuvalu, which is another crucial point of their humanitarian appeal.[171] The last part of the appellants' argument refers to climate change as a humanitarian circumstance.

The Tribunal recognized that the adverse effects of natural disasters could amount to a humanitarian circumstance which might be observed in the practice of states. Several states have already established different domestic policies to provide protection to people displaced by climate

169 AC (Tuvalu), *supra* note 159, at [83] – [84].
170 AC (Tuvalu), supra note 159, at [102] – [108].
171 Immigration and Protection Tribunal New Zealand, AD (Tuvalu) [2014] NZIPT 501370-371.

change events. The judge also acknowledged that negative impacts of climate change can affect the enjoyment of basic human rights as argued in the Kiribati case. The magistrate also pointed out the vulnerability of Tuvalu in the context of climate change and environmental degradation. [172]

By taking into consideration all the arguments presented, the Tribunal decided to grant residency visas to the appellants due to the humanitarian nature of their circumstances. The return of the family to Tuvalu would be unjust or unduly harsh to the appellants. The Tribunal accepts that the "exposure to the impacts of natural disasters can, in general terms, be a humanitarian circumstance, nevertheless, the evidence in appeals as this must establish not simply the existence of a matter of broad humanitarian concern, but that there are exceptional circumstances of a humanitarian nature such that it would be unjust or unduly harsh to deport *the particular appellant* from New Zealand."[173]

The New Zealand Tribunal did not recognize the appellants as refugees according to the terms of the Refugee Convention and to their domestic legislation. New Zealand law adopts the same refugee definition of the 1951 Convention.[174] However, the appeal court granted the appellants humanitarian visas in light of their circumstances. Granting the humanitarian visa was possible because of the current domestic legislation of New Zealand, but this might not be a state practice in some other countries.[175] It is worth pointing out that some countries have envisioned humanitarian grounds for situations of climate change-related displacement. Countries like Finland and Sweden have developed a complementary protection regime for those people that cannot return to their country due to environmental disasters.[176]

The most interesting feature of this case is that they were not recognized as refugees or protected persons under domestic law, but they were granted a residency visa based on humanitarian nature. Alice Edwards discusses this state policy. She expressly mentions cases of people that could be recognized as "environmental refugee" in specific situations, but governments declare that they are receiving the visa based on humanitarian reason. Edwards argues that these humanitarian visas are usually granted in sudden-onset disasters.[177] The Tuvalu case, therefore, could be described as innovative in the sense that it happened in the context of slow-onset environmental degradation and not the usual circumstances of sudden-onset disasters. It was

172 AD (Tuvalu), *supra* note 171, at [27] – [29].
173 AD (Tuvalu), *supra* note 171, at [32].
174 See article 129, Immigration Act 2009, New Zealand Legislation, Available at http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440799.html [Accessed 27 March 2019]
175 Mc Adam, *supra* note 138, p. 137.
176 Mc Adam, *supra* note 46, p. 112-113.
177 Edwards, *supra* note 100, p. 227.

important to emphasize the essential role of human rights law in being complementary protection to the Refugee Convention.[178]

5.1 Summary of findings

The Tuvalu case was widely publicized by the media as the first case that recognized a climate change refugee. This information is not accurate because the appellants abandoned the claim of refugee once they recognized that there was no legal base for claiming refugee status.[179] One can assert that the Refugee Convention does not apply in any sense to the Tuvalu case as the Court did not recognize the condition of the appellants as refugees, nor did the appellants themselves believe that they should be granted the status of refugees. Hence, by analyzing the Tuvalu case under the light of the Refugee Convention, one can conclude that most of the requirements of the Convention do not meet the situation of the Tuvalu case.

The OAU Convention and the Cartagena Declaration incorporated the Refugee definition, but they also created definitions capable of managing their own refugee crises. As already discussed, the external environmental migrants would not be able to fit into most of the requirements. The only possible criterion would be "events seriously disturbing the public order". By analyzing the Tuvalu case, it is not possible to infer that the effects of climate change had caused serious disturbance of the public order. The elements of this case were very similar to the Kiribati case, hence there are no substantial reasons to lead to a different conclusion from the previous analysis.

Nevertheless, the main difference between the two cases was the outcome. While Teitiota was not granted a refugee visa, the appellants of the Tuvalu case were allowed to remain in New Zealand based on humanitarian grounds. The main argument used by the appellants were their ties with the local community, and they also emphasized the presence of the majority of their relatives in New Zealand. The appellants secondarily used the effects of climate change and degradation as humanitarian circumstances.

At first, the analysis might conclude that the humanitarian visa was granted only on the base of the main arguments. However, through a thorough analysis of the language used in the judicial decision, one might conclude that the climate change factor was also taken into consideration. A

178 McAdam, *supra* note 138, p. 135.
179 McAdam, *supra* note 138, p. 133.

particular phrase can corroborate this argument: "The Tribunal is satisfied that, when the above matters are taken into account on a cumulative basis, there are exceptional circumstances of a humanitarian nature, which would make it unjust or unduly harsh for the appellants to be removed from New Zealand (emphasis added)".[180] This part comes right after the analysis of the climate change argument of the appellants. One can conclude that even though the climate change issue was not the main factor in granting the humanitarian visa, it influenced to some extent the final decision of the Court. It is important to notice that New Zealand could only grant a visa based on humanitarian grounds because the legislation of the country permitted the Tribunal to adopt this stance. The Tribunal was very careful in not deeply discussing the merit of the effect of climate change as the cause of displacement because it could impose a serious precedent on the New Zealand government. It could imply serious obligations for the government.

The analysis of this case corroborates some of the findings of the Kiribati case. People displaced by climate change events might fit the refugee definition of the 1951 Convention under minimal situations. Judicial courts will be responsible for analyzing case by case the claims of refugee status based on the impacts of climate change. Jurisprudence might be responsible for changing or broadening the interpretation of the refugee definition. Again, one can perceive the imperative need to establish a proper definition to guarantee the legal protection of the external environmental migrants. Without a single definition, people are subjected to the individual interpretation of judges or the willingness of states to accept them under humanitarian reasons, for instance.

The most important finding is the clear void in the international protection of people displaced by climate change events, especially cases of slow-onset degradation. Experts like Jane McAdam already recognize this gap. She claims that "without special humanitarian or migration pathways, people affected by the longer-term impacts of climate change and disasters may be stuck. This is why States need to work proactively towards creating a toolkit of mobility responses, alongside mitigation, adaption and development strategies".[181] As stated before, international organizations are dealing with refugees and migrants, but there is no unique international governmental organization to tackle the problem of people displaced by climate-related events. International organizations have already proved to be effective in enhancing cooperation between states in environmental issues. International law does not have a unique legal document to guarantee protection to external environmental migrants or so-called "climate refugees". This gap might be filled by international institutions dealing with this issue area.

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180 AD (Tuvalu), *supra* note 171, at [30].
181 Mc Adam, *supra* note 138, p. 138-139.

5.2 The role of international institutions

The idea of an anarchical system is the core of some of the most important theories of international relations. Scholars have decided to adopt different approaches to explain the consequences of this anarchical system. According to the neoliberal institutionalism approach: "States find that autonomous self-interested behavior can be problematic and they prefer to construct international institutions to deal with a host of concerns".[182] Meanwhile, realists claim that "international organizations are of little help in channeling this perpetual power struggle since they cannot change the anarchical structure of international relations. Rather, international organizations are simply used by powerful states to implement their power politics more effectively and to pursue their self-interest".[183]

The theories of international relations have different understandings about the role of international institutions. Nevertheless, throughout the last decades, one could observe the relevance of international institutions in dealing with relevant topics such as human rights, migration, refugees and others. The increasing international cooperation among States is one of the essential characteristics of international institutions.

Before going further into the possible role of international institutions in dealing with displacement caused by climate-related events, it is important to understand the difference between the international institution, the international regime and international organization.

International institutions comprehend two different classes: international regime and international organization. The most well-known definition of the international regime is attributed to Stephen Krasner. He defines regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[184] While international regimes focus mainly on a specific issue area such as protection of human rights, international organizations can exceed issue areas and deal with several different interests, such as the example of the UN or the European Union. Another major distinction is that international organizations can function like actors, but international regimes do not have this

182 Stein, Arthur A., 2008, *Neoliberal Institutionalism*, The Oxford Handbook of International Relations, Oxford: Oxford University Press, p. 208.
183 Rittberger, Volker, Bernard Zangl, 2012, *International Organization: Polity, Politics and Policies*, New York: Palgrave Macmillan, Chapter 2, p. 15.
184 Krasner, Stephen D., 1983, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*. In International Regimes, edited by S. D. Krasner. Ithac, p. 186.

characteristic.[185] To sum up, international organizations are defined as "international social institutions that are collective or corporate actors and can cover several issue areas of international relations".[186]

Even though these two classes of international institutions might seem very similar, they have some underlying differences. First, the features (principles, norms, rules, decision-making process) of a particular international regime can get inspiration from different international organizations.[187] One can say that there is a consolidated refugee regime in the world. International organizations are dealing with the problem of the refugees such as the UNHCR and Refugee International, or Human Rights Watch coping with human rights issues. Other legal instruments have also influenced the refugee regime, as in the case of the Universal Declaration of Human Rights, the UN Charter, the OAU Convention, and the Cartagena Declaration. To summarize, the refugee regime encompasses a wide range of international organizations, human rights law treaties, refugee law documents, but mostly, this regime is based on the principles, norms, rules and decision-making procedures contained in the 1951 Convention. The Refugee Convention is the cornerstone in the development of a refugee regime.

The second element is that international organizations can be an important support tool for international regimes, and the latter can also play this role for the former. International organizations have the capability to generate norms, and, as such, they can influence the creation of new regimes.[188] As previously mentioned, there is a clear gap in the protection of individuals displaced by climate change events. Despite the claim of few scholars that the so-called "climate refugees" should receive protection under the scope of the 1951 Convention, the majority of scholars and international institutions do not support this argument.

Throughout this work, one can observe the fundamental role developed by international organizations like the UNHCR, the IOM, the Nansen Initiative and other institutes in dealing with the issue of forced displacement. These institutions can exert considerable influence in changing the refugee regime by creating new norms or modifying the existing ones. As Shaw argues, international organizations may be crucial in consolidating new customary laws.[189] Instruments of soft law such as the Cartagena Declaration, or jurisprudence from tribunals like the Kiribati and

185 Rittberger, Volker, Zangl, Bernhard, Kruck, Andreas, 2012, *International Organization: Polity, Politics and Policies,* Basingstoke: Palgrave Macmillan, 2nd edition. p.5.
186 Rittberger et al, *supra* note 185, p.6.
187 *Ibid*.
188 Rittberger, and Zangl, *supra* note 186, p. 8.
189 Shaw, *supra* note 107, p. 83.

Tuvalu cases may not directly change the foundation of the refugee regime, but one can say that they can positively affect the development of the refugee regime.

International organizations can also wield a significant weight in changing the current refugee regime. The problem of displacement caused by climate change events is attracting more attention in the international community. The UN has already recognized the plight of these displaced people however, there is no consensus regarding the best course of action to tackle the issue. The creation of an international organization might be a possible solution to the evolution of the international refugee regime in this particular aspect.

Conclusion

Migration has always been a regular event in the history of humanity. Society started to identify patterns in the sorts of migration and attribute different terminologies according to the situation. For that reason, it is currently possible to define the difference between migrants, refugees, and internally displaced people, for instance. However, society is a mechanism in constant evolution, and, as such, new social behaviors and situations require adaptation.

The study of the effects of climate change is relatively new to the international community. Only a few decades ago, the world discovered the consequences of climate change for the livelihood of our societies. After comprehending the possible effects of climate change, it was possible to associate that with the forcible displacement of people. Increasing number of natural hazards, sinking states, floods and droughts are just some of the reasons that have caused an increased number in movement. To those affected by this situation, the term "climate refugee" or "environmental refugee" was tailored. It would be logical to assume that if those people are referred to as refugees, they should be entitled to refugee protection under the 1951 Convention. However, this presumption is widely refuted by international organizations, States and scholars. In their view, the external environmental migrants do not meet the requirements described in the Refugee Convention, for that reason, they could not be refugees. In this case, is it possible to say that "climate refugees" can never be considered as refugees?

A thorough analysis of the refugee definition might help to answer this question. The 1951 Convention is the universal instrument of refugee law, and it is the core of the refugee regime. The present thesis analyzed the terms used in the refugee definition of the 1951 Convention. The current interpretation of the terms was crucial to understanding the meaning behind the whole definition. In general, we could conclude that the 1951 Convention was created in a very different historical context, and for that reason, the definition was tailored to depict the refugee problem of that time, in which climate change was never even mentioned. Hence, it is hard to envisage externally environmental migrants as refugees because they do not fit under the main requirements of the 1951 Convention. Nevertheless, one cannot assert that those people can never be refugees. Under certain circumstances, they might meet the requirements.

In the decades following the conclusion of the Refugee Convention, other refugee crises emerged in the world. What became clear was that not every displaced person could fit under the 1951 Convention, however they still needed to be protected somehow. Some countries decided to tackle this issue by creating regional instruments with complementing definitions of refugees.

African and Latin American countries created two widely known instruments that expanded the refugee definition contained in the 1951 Convention. Even though these two instruments only had regional applicability (and one is soft law), one can say that it attracted attention to the limited scope of the Refugee Convention.

This work also analyzed these two instruments in order to assess the appropriateness of their refugee definitions in encompassing external environmental migrants. Once again the conclusion was that the historical and social context of that time influenced the concept of refugee in the OAU Convention and the Cartagena Declaration. In most cases, it would be hard to consider an external environmental migrant as a refugee according to these two instruments. The terms used in the refugee definitions as "foreign aggression" or "foreign domination" would hardly be adequate to grant refugee status to the external environmental migrants. However, both documents mentioned the events seriously disturbing the public order as a requirement in their refugee definition. In this sense, it is possible to picture specific situations in which externally environmental migrants could be considered as refugees in cases of disruption of the public order in the aftermath of sudden-onset disasters, for instance.

The analysis of the terms of the refugee definitions contained in these three legal instruments allow the comprehension to whom these documents might be applicable. From the study of the two cases law of individuals who claimed to be "climate refugee" some conclusions were possible.

First, it is highly unlikely that a person displaced by the effects of climate change will receive refugee status under the 1951 Convention. The requirements described in the Convention are very specific, and anyone who wants to receive protection must fit the definition. In such cases, it is not acceptable to attribute to the "environment" the agency of persecution in situations of slow-onset disasters, for instance. It also hard to prove the systematic failure of the state in protecting the citizen against climate change effects, hence it is difficult to determine the exact situation when an external environmental migrant could be a refugee. This analysis will significantly change from to case to case.

Second, the States are hardly willing to expand the interpretation of the definition to encompass this particular situation. Such an important decision could impact the social-economic aspects of the countries as they would be obliged to guarantee the rights of refugees according to international law in new situations. As already discussed, even if the states accept to receive someone who might be considered as external environmental migrant, they still have discretionary power because there is not an international law document binding their actions so far. The decision

on the Tuvalu case is a good example. The judges acknowledged the concerning situation of Tuvalu, but they stressed that the permission to stay in New Zealand was based on humanitarian grounds.

The main obstacle observed is that the effects of climate change can be felt in different intensities and period. It is easier to grant a person refugee status if the circumstances of the displacement were caused by an unexpected condition such as tsunamis, hurricane, and floods for instance. On the other hand, it is hard to apply these legal instruments in the cases of sinking states because the effects will take years before becoming irreversible, as in the case of Tuvalu and Kiribati. In other words, an external environmental migrant might fit under the refugee definition of one of these three legal instruments under certain circumstances, however in most cases they will not fit under the umbrella of the refugee regime.

The main conclusion is that these people are in limbo due to this restricted definition of the term refugee. There is a clear gap in the protection of external environmental migrants. International organizations such as the UNCHR and the IOM have already acknowledged the plight of these forcibly displaced people. Nevertheless, neither one of these institutions were able to take full responsibility for protecting them under this particular situation. As described in the summary of findings, there is a lack of definition for people impacted by climate-related events. The UNHCR claims that these people are not refugees, and the IOM defines them as a sort of migrant. For that reason, it is crucial to establish a unique definition to describe them. It would be an essential step in filling the current limbo situation that externally environmental migrants find themselves in.

International organizations might provide some support for those going through an emergency, but this issue is not in the foundation of these current organizations as they deal with other specific issue areas. States also failed to address the problem. In recent years, countries are already struggling to cope with the most recent refugee crises. It is not a surprise that governments do not want to add more people under the definition of refugees because it would bind them under international law even further.

Even if international governmental organizations do not plan to take matters into their own hands, some international non-governmental organizations are willing to do so. The Nansen Initiative is an excellent example of an organization concerned with the displacement caused by disasters and climate change effects. By studying the features of the international institutions, one can conclude that an INGO such as the Nansen Initiative and an IGO such as the UNHCR and IOM can exert a significant influence in changing the international refugee regime.

The present thesis concludes that the scope of applicability of the 1951 Convention to cases of external environmental migrants is minimal, as it is for the OAU Convention and Cartagena declaration due to the limited interpretation of the refugee definition. The essential role of international organizations in society might wield impact over the refugee regime by broadening the definition of the term refugee. It could bring positive changes to expand the concept, or event to create a new concept, of the situation of external environmental migrants.

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