

# The Refugee Convention and Recognition of Climate Refugees

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**Abstract:** Millions of peoples across the world continue to be internally and internationally displaced due to numerous adverse impacts associated with climate change. It is consequently demanded to extend the scope of the Refugee Convention to recognise climate refugees. This research focuses on the essences of the definition of refugees under the Refugee Convention. It also assesses the justification of the claim to reform the Convention to encompass climate refugees under its mandate. The approach adopted in this study is the black-letter law research reviewing the Refugee Convention, pertinent journal articles, seminal books and websites of some international organisations including the UNHCR and IDMC. The findings of the study show that the Convention definition of a refugee has specific challenges to recognise climate refugees under its mandate and it is thus ill-suited to recognise climate refugees. It is concluded that the Convention definition of a refugee is outdated; however, despite the obsolescence of the definition, this is not the time to reform the Convention extending its scope to climate refugees for several practical reasons. The paper recommends for designing a separate device to address the vulnerabilities of climate refugees leaving the Convention to deal with its existing mandate.

**Keywords:** Climate refugee, convention, international border, persecution, reform, and refugee.

## 1. Introduction

The 1951 Refugee Convention<sup>1</sup> and the 1967 Protocol<sup>2</sup> are the core instruments to defend the rights of refugees under the international refugee legal regime. Although the Refugee Convention was originally signed to defend a group of people of post-Second World War across Europe,<sup>3</sup> the Protocol made the Convention universal removing its territorial and temporal limitations. Even after signing the Protocol, the Convention is criticised for its narrow definition of refugees as the treaty has failed to address vulnerabilities of a large number of

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<sup>1</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention or Convention).

<sup>2</sup> Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol or Protocol).

<sup>3</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 35.

displaced persons around the world.<sup>4</sup> Since the number and diversity of displaced people are increasingly high across the globe, the limitation of the Convention definition of refugees has become intense in recent time. Although many categories such as 'climate refugees' are popularly termed as 'refugees', they are hardly identified as refugees under refugee law.<sup>5</sup> At the same time, it is also false to allege that 'there is a single, immutable legal category of the "refugee" in international law'.<sup>6</sup> It is consequently claimed to amend the Refugee Convention updating the definition of a refugee so that it can encompass all displaced persons.

This paper aims to underscore that the definition of a refugee under the Refugee Convention is outdated to recognise, in particular, climate refugees. Nevertheless, it is emphasised that this is not the time to reform the Convention for specific challenges. The study follows the doctrinal research methodology analysing primarily the international treaties and relevant judgments. It is worth noting that despite the paper recommends for designing a separate device to address the vulnerabilities of climate refugees leaving the Convention to deal with its existing mandate, the research will not provide a proposal for the governance of the climate refugees under international law.

To this end, this article is divided into three sections. The first section will set the scene with regard to the definition of refugees and climate refugees. The essences of crossing international borders and problems with the perception of persecution will be highlighted in the second section to expose the obsolescence of the definition of refugees. Finally, the third section underlines that although the definition of refugees is outdated in addressing protection for climate refugees, it is not the time to revisit the Convention due to the political unwillingness of the international community and prospective adverse effects upon the rights of 'Convention refugees'.<sup>7</sup>

## 2. Refugees and climate refugees: setting the scene

The sense of a refugee is not limited to a single connotation, rather it has a multiplicity of meanings.<sup>8</sup> The climate refugee is categorised another class of

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<sup>4</sup> Andrew Shacknove, 'Who Is a Refugee?' (1985) 95 Ethics 274.

<sup>5</sup> Maxine Burkett, 'Climate Refugees' in Erika J Techera (ed) *Routledge Handbook of International Environmental Law* (Routledge 2012)717.

<sup>6</sup> Simon Behrman and Avidan Kent, 'Overcoming the legal impasse? Setting the scene' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018)10.

<sup>7</sup> In this essay, the 'Convention refugees' refers to those persons who are qualified to be recognised as refugees under the present definition of the Convention.

<sup>8</sup> Beemanand Kent (n 6) 11.

refugees;<sup>9</sup> however, the meaning of a climate refugee is distinct from the traditional meaning of a refugee.

Regarding the denotation of a refugee, Article 1 of the Convention provides the definition of refugees. Notably, the provision contains nearly 850 words to define refugees encompassing clauses A to F. While clauses B to F deal with some relevant issues including cessation of refugee status in clause C and denial of refugee status in clause F, the definition of refugees is clarified in clause A counting the applicability of the Convention. This clause is further divided into paragraphs 1 and 2 in the Convention. Whereas Paragraph 1 recognises refugees as persons who have already been identified under the mandate of earlier treaty arrangements,<sup>10</sup> Paragraph 2<sup>11</sup> enumerates that a person is qualified refugee if he/she

... 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 and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>12</sup>

Analysing Article 1A (2), it is deduced that to be considered refugees under the Convention, one person is required to, firstly, cross an international border and secondly, such crossing will be under a well-founded fear of persecution for the reason of race, religion, nationality, political opinion and, membership of a particular social group.<sup>13</sup> However, neither the Convention nor any other instruments including the Protocol, and the UNHCR Handbook<sup>14</sup> define the terminologies including persecution. Consequently, there always exists an uncertainty to limit the status of a refugee. It is claimed, on the one hand, that all refugees can be protected under the Convention definition, and on the other hand, it is argued that there is hardly any scope to extend the definition of refugees to cope with the vast majority of displaced persons including climate refugees across the globe.

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<sup>9</sup> Frank Biermann and Ingrid Boas, 'Preparing for warmer world: Towards a global governance system to protect climate refugees' (2010) 10(1) *Glo Env'tl Pol* 60, 74.

<sup>10</sup> Article 1A (1) (n 1).

<sup>11</sup> The starting phrase of this paragraph 'As a result of events occurring before 1 January 1951' has been disregarded since the 1967 Protocol removed the temporal and geographical limitations of the Convention.

<sup>12</sup> Article 1A (1) (n 1).

<sup>13</sup> *ibid.*

<sup>14</sup> UNHCR, 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 (UNHCR Handbook or Handbook) UN doc HCR/1P/4/ENG/REV3 (4<sup>th</sup> edn 2019).

Regarding the meaning of climate refugees, these people are argued as one of the categories of multiple meanings of a refugee. It is worth noting the term 'climate refugees' is hugely debated and there is a good deal of other names to identify these people. Terminski shows 39 alternative names used by various researchers and institutions to refer to climate displaced persons.<sup>15</sup> Therefore, the problem is not the absence of a name, rather the problem is the abundance of names and this abundance of identities ultimately leaves them in a place of no clear legal recognition under international law.<sup>16</sup> The disagreement regarding the nomenclature is also 'a key problem that hinders research' on these people.<sup>17</sup> However, it is discovered that two mostly used terms in the literatures are 'climate refugees' and 'environmental refugees'<sup>18</sup> and this study prefers climate refugees to others.

To note, Lester Brown of the Worldwatch Institute coined 'environmental refugee' for the first time in 1970s.<sup>19</sup> However, in 1985, the term 'environmental refugee' was firstly popularised and defined by El-Hinnawi at a United Nations Environmental Programme (UNEP) report.<sup>20</sup> El-Hinnawi remarks that

environmental refugees are those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life.<sup>21</sup>

In addition, Myers and Kent identified 'environmental refugees' as the people

... who can no longer gain secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought, desertification, soil erosion, water shortage and climate change, also natural disasters such as cyclones, storm surges and floods.<sup>22</sup>

Furthermore, Atapattu classifies climate refugees as the new category of refugees signifying peoples who are displaced internally or internationally due to various

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<sup>15</sup> BogumilTerminski, 'Towards recognition and protection of forced environmental migrants in the public international law: Refugee or IDPs umbrella?' (2012) <<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-329056>> accessed 15 March 2021.

<sup>16</sup> Burkett (n 5) 720.

<sup>17</sup> Bierman and Boas (n 9) 52.

<sup>18</sup> Terminski (n 15).

<sup>19</sup> L W Marshal, 'Toward a new definition of 'refugee': is the 1951 convention out of date?' (2011) 37(1) *Euro J Trauma Emerg Surg* 63.

<sup>20</sup> *ibid*.

<sup>21</sup> EssamEl-Hinnawi, 'Environmental refugees' United Nations Environmental Program (UNEP) (1985) 4.

<sup>22</sup> Norman Myers and Jennifer Kent, 'Environmental exodus: an emergent crisis in the global arena' (1995) Climate Institute, Washington DC as cited by Biermann and Boas (n 9) 62.

aspects of climate change like 'drought, floods, severe weather events and sea-level rise'.<sup>23</sup>

Given that there is a divergence regarding the nomenclature as well as definition concerning peoples who are displaced due to adverse impacts of climate change, this study prefers 'climate refugees' to denote climate change displaced persons. Again, where the concept of a refugee under international law refers to only cross-border persons,<sup>24</sup> climate refugees signify in this paper both internally and internationally displaced persons. Although it is claimed that the 'concept of climate refugee might limit, rather than expand protection' to the displaced people,<sup>25</sup> Biermann and Boas underscore that 'the protection of climate refugee will receive the legitimacy and urgency it deserves' if these persons are called climate refugees.<sup>26</sup> Behrman and Kent further argue that there is no strict legal restriction to categorise climate refugees as an additional group of refugees.<sup>27</sup> Moreover, the crucial benefit of using climate refugees is that it highlights the 'seriousness of their predicament, their agency and the deserving nature of their claim to protection'.<sup>28</sup> On the above, this paper uses climate refugees signifying persons who are displaced internally and internationally due to adverse impacts associated with climate change.

To sum up, there are certain essences of the definition of a refugee under the Refugee Convention and conversely, there is a divergence regarding the nomenclature of climate refugees. To test the scope of the definition of refugees regarding recognition of climate refugees, the elements of refugee status under Article 1A Paragraph 2 of the Convention are focused below.

### **3. Antiquated definition of refugees: analysing requirements**

The Convention definition of a refugee as provided in Article 1A(2) is obsolete to protect all displaced persons of today's world and to contend the arguments, crossing international frontiers and perception of persecution are analysed respectively.

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<sup>23</sup> Sumudu Anopama Atapattu, 'A New Category of Refugees? "Climate refugees" and a gaping hole in international law' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 41.

<sup>24</sup> Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998, para 2).

<sup>25</sup> Platform on Disaster Displacement (PDD), 'State-led, regional and consultative processes: opportunities to develop legal frameworks on disaster displacement' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 129, 130).

<sup>26</sup> Beeman and Kent (n 6) 66.

<sup>27</sup> *ibid.*

<sup>28</sup> Beeman and Kent (n 6) 12.

### 3.1 Crossing international border and inability or unwillingness to return

The key element to be considered a refugee is crossing an international border. It further requires the person who crosses the border to remain out of the border owing to either of his/her inability or unwillingness to return.

The UNHCR Handbook has explained that to be treated as a refugee a person has to cross the border of the country of nationality.<sup>29</sup> For stateless persons, however, it suffices if he/she is outside the frontier of the country of his/her former habitual residence.<sup>30</sup> Again, the person who possesses dual nationality has to prove that he/she cannot avail protection in either of the country of his/her nationality.<sup>31</sup> Notably, the country of nationality is the country of which the applicant is a citizen and the passport presupposes the assumption of such nexus between the person and his/her country of nationality.<sup>32</sup> In other words, the applicant has to be present in the border of the country where he/she applies for the refugee status. This, however, does not mean that the person must leave the country of nationality under a well-founded fear of persecution from the very beginning.<sup>33</sup> When the dread of persecution arises after leaving of the country, the refugee is known as refugee “sur place”.<sup>34</sup> Although Shacknove rejects the requirement of crossing international frontier outright claiming it as ‘an unnecessary condition for establishing refugee status’,<sup>35</sup> the Handbook contends that ‘there are no exceptions to this rule’.<sup>36</sup>

As the definition of refugees requires that the question of getting protection under the Convention does not arise unless the person crosses an international border, hundreds of thousands of people being displaced internally across the world are left outside the protection of contemporary refugee definition.<sup>37</sup> To illustrate, according to the UNHCR, there are 70.8 million people who are forcibly displaced worldwide.<sup>38</sup> Among these people 58.33% are internally displaced and remaining 41.67% are cross-border displaced persons.<sup>39</sup> It is noteworthy that among the cross-border displaced persons, 36.58% are refugees under the mandate of the UNHCR and UNRWA, and 4.94% are

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<sup>29</sup> UNHCR Handbook (n 14) 25.

<sup>30</sup> Article 1A (2) (n 1).

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> UNHCR Handbook (n 14) 26.

<sup>34</sup> *ibid.*

<sup>35</sup> Shacknove (n 5) 277.

<sup>36</sup> UNHCR Handbook (n 14) 25.

<sup>37</sup> Angela Williams, ‘Turning the tide: recognizing climate change refugees in international law’ (2008) 30(4) *Law & Policy* 502, 510.

<sup>38</sup> UNHCR, ‘*Figures at a glance: Statistical Yearbooks*’ (19 June 2019) <<https://www.unhcr.org/uk/figures-at-a-glance.html>> accessed 19 February 2021.

<sup>39</sup> *ibid.*

asylum-seekers.<sup>40</sup> Again, the Internal Displacement Monitoring Centre (IDMC) exposes, for a period of a decade since 2008, some 6.13 million people are displaced internally for conflicts and violence, and other 26.27 million people are dislocated within their countries for disasters.<sup>41</sup> This huge number of displaced persons who reside within their home country are left outside the scope of contemporary definition of refugees.<sup>42</sup>

In addition to crossing the border of the country of nationality, the definition further requires establishing that the person is 'unable' or 'unwilling' to avail the protection of his/her country of nationality.<sup>43</sup> Notably, inability of the person will be proved if there prevails circumstances like 'a state of war, civil war or other grave circumstance' which by themselves prevent the country from the protection irrespective of the will of the applicant.<sup>44</sup> Again, unwillingness will be established if the applicant is unwilling to return to his/her country of nationality for 'the well-founded fear of being persecuted'.<sup>45</sup> Thus, the definition requires that the person is unable or unwilling to return to the country of nationality because of the persecutory acts of the government.<sup>46</sup> This suggestion is outweighed since the government is not the sole persecutor for all displacement in contemporary world.

To summarise, the present definition of a refugee is outdated as it fails to accommodate the people who remain within the frontier of their own country. Again, many people crossing the border are left outside the protection under the Convention since they are failed to prove specific type of persecution which will be examined in following sub-section.

### **3.2 Well-founded fear of persecution and the causal nexus**

After crossing the international border, the person has to prove that he/she flees the frontier under the 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership to particular social group and political opinion'.<sup>47</sup> Notably, the concept of well-founded fear of persecution is inherently objective.<sup>48</sup> To illustrate, along with the subjective element of 'fear', the objective element of 'well-founded' is required establishing that the action or non-action is

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<sup>40</sup> *ibid.*

<sup>41</sup> IDMC, '*Global Internal Displacement Database*' <<https://www.internal-displacement.org/database/displacement-data>> accessed 25 February 2021.

<sup>42</sup> Williams (n 37) 510.

<sup>43</sup> Article 1A (2) (n 1).

<sup>44</sup> UNHCR Handbook (n 14) 26.

<sup>45</sup> *ibid.*, 27.

<sup>46</sup> Katrina Miriam Wyman, 'Responses to Climate Migration' (2013) 37 *Harv Envtl L Rev* 167, 179.

<sup>47</sup> Article 1A (2) (n 1).

<sup>48</sup> Forough Ramezankhah, 'A Tale of Two Men: Testimonial Styles in the Persecution of Asylum Claims' (2017) 29(1) *Int'l LJL* 110,117.

persecution for a specific reason.<sup>49</sup> Although the notion of 'well-founded fear' is quite settled, disagreement as to the implication of persecution and the restricted grounds are still evident. It is therefore significant to analyse the controversy regarding the meaning of persecution and the reasons of such persecution.

Despite persecution is the key essence to be considered a refugee, neither the Convention nor the Protocol and the UNHCR Handbook defines 'persecution'.<sup>50</sup> Lord Hoffmann mathematically illustrates that 'persecution = serious harm + failure of state protection'.<sup>51</sup> Again, the UNHCR Handbook points out that 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution'.<sup>52</sup> Considering the etymological and conventional meaning, there are two suggestions in respect of the sense of persecution. While one suggestion claims that there is a scope to extend the concept of persecution to encompass all refugees even after 70 years of the draft, the second suggestion contends that the perception of persecution as it is used in the treaty is inadequate to address the displaced persons in the modern time.

Concerning the claim that the existing definition of persecution is sufficient to address the vulnerabilities of the present world, Marshal alleges that 'definition, by necessity, may change or need to be changed to accommodate situations that arise'.<sup>53</sup> Agreeing with the suggestion Fitzpatrick claims that 'as the nature and motivations of the persecutors evolve, the definition of persecution could likewise be adapted'.<sup>54</sup> It is thus attempted that the term persecution is 'elastic' and it does not necessarily confine it only the political state-led persecution.<sup>55</sup> Since a treaty is required to be construed 'in good faith in accordance with its ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose',<sup>56</sup> the endeavour to expand the meaning of persecution contradicts with the rules of interpretation of treaty law. This is because the UNHCR Handbook enumerates the ordinary meaning of persecution is the state-led political persecution.<sup>57</sup> Again, as the

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<sup>49</sup> UNHCR Handbook (n 14) 19.

<sup>50</sup> Andreas Zimmermann and Claudia Mahler, 'Article 1A, para. 2: Definition of the term 'Refugee' in Jonas Dorschnerp and Felix Machts (assistant eds) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (OUP 2011) 281-465.

<sup>51</sup> *R v Immigration Appeal Tribunal and Another; Ex parte Shah*, [1999] 2 AC 629 (UKHL, Mar. 25, 1999) 653 (per Lord Hoffmann).

<sup>52</sup> UNHCR Handbook (n 14) 21.

<sup>53</sup> Marshal (n )63.

<sup>54</sup> Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 Harv Hum Rts J 229, 240.

<sup>55</sup> *ibid.*

<sup>56</sup> Vienna Convention on the Law of Treaties (adopted 23 April 1969, entered into force 27 January 1980) UN doc A/CONF 39/27 (VCLT) Article 31(1).

<sup>57</sup> UNHCR Handbook (n 14) 21.



Convention was drafted to protect 'the civil and political rights of people from persecution of oppressive governments,' the expansion of the definition is also inconsistent with context, object and purpose of the Convention as well.<sup>58</sup>

The other suggestion highlights that the concept of persecution is too narrow to accommodate the various forms of persecution of the contemporary world.<sup>59</sup> The Convention originally identifies government as persecutor and equates persecution with political persecution.<sup>60</sup> The UNHCR Handbook also clarifies that the authorities of a country are the agents of persecution.<sup>61</sup> The agent of persecution even might extend to any section of population<sup>62</sup> or to a non-state actor.<sup>63</sup> However, rather than the authorities of a country or a non-state actor, there are other agents whose identity is obscure as persecutors under the contemporary refugee definition.<sup>64</sup> To illustrate, it is hardly possible to make responsible any particular government or any other actor for the climate change impacts which causes thousands of people displaced internally and internationally.<sup>65</sup> In *Ioane Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* case, Teitiota claimed climate change refugee status in New Zealand arguing that his government of Kiribati is unable to stop sea-level rise in the one hand, and the international community is responsible as persecutor for global warming causing sea-level rise in his country, on the other.<sup>66</sup> However, the High Court of New Zealand rejects the claim pointing out that 'the international community simply lacked to any elements of motivation to harm low-lying states like Kiribati'.<sup>67</sup>

In addition to persecution, the reason of such persecution is also required to analyse the definition of refugee under the Convention.<sup>68</sup> Reasons for persecution, as stated in the Convention, are race, religion, nationality, membership to a particular social group and political opinion.<sup>69</sup> Although the

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<sup>58</sup> Tellina Jolly and Nafees Ahmad, 'Climate Refugees under International Climate Law and International Refugee Law: Towards addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice' (2014-2015) 14 ISIL YB Int'l Human & Refugee L 216, 243.

<sup>59</sup> Frank Biermann, 'Global Governance to Protect Future Climate Refugees' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 267.

<sup>60</sup> Jessica B Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 NYU Env'tl LJ 513.

<sup>61</sup> UNHCR Handbook (n 14) 22.

<sup>62</sup> *ibid.*

<sup>63</sup> William Thomas Worster, 'The Evolving Definition of the Refugee in Contemporary International Law' (2012) 30 Berkeley J Int'l L 94, 97.

<sup>64</sup> Fitzpatrick (n 54) 240.

<sup>65</sup> Tellina Jolly and Nafees Ahmad (n 58) 245.

<sup>66</sup> [2013] NZHC 3125, 30, 46, 55.

<sup>67</sup> Xing-Yin Ni, 'A Nation Going under: Legal Protection for Climate Change Refugees' (2015) 38 B C Int'l & Comp L Rev 329.

<sup>68</sup> Article 1A (2) (n 1).

<sup>69</sup> *ibid.*

Convention does not explain, the Handbook elucidates the meaning of the restricted grounds and it admits that the meanings frequently overlap with each other.<sup>70</sup> Notably, among the five categories of reasons of persecution, 'social group' is the widest one and its basis includes others.<sup>71</sup> It is therefore argued the 'social group' protects the refugees who are persecuted for 'unforeseen' reasons.<sup>72</sup> However, the appraisal to extend membership to a particular social group to encompass all dislocated persons might be ill-suited in many cases.<sup>73</sup> By way of example, the attempt to cover the environmentally displaced persons as members of particular social group is criticised arguing it as 'a matter of academic interest only'.<sup>74</sup>

For the limitations of the notion of persecution under the Convention, some regional instruments are adopted to widen the scope of persecution. To illustrate, 1969 OAU Convention,<sup>75</sup> and the 1984 Cartagena Declaration<sup>76</sup> accept a broader definition of persecution stating events or circumstances which seriously disturbing public order as persecution.<sup>77</sup> These regional instruments convincingly highlight that persecution is not the only, but one of the 'diverse ways' for the termination of 'the normal bond between the citizen and the state'.<sup>78</sup> It is therefore submitted that the meaning of persecution under the Convention definition of refugee is confined to state-led political persecution.

To recap, considering the traditional meaning of persecution and the object and purpose of the Convention, it is difficult to extend persecution beyond 'political persecution'.<sup>79</sup> As the definition of refugee requires crossing international frontier in the one hand and provides narrow meaning of persecution on the other, it is therefore underscored that the existing definition of a refugee under the Convention is antiquated to encompass climate refugees displaced internally and internationally in the contemporary world. Consequently, the Convention is claimed to be reformed to update the definition of a refugee.

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<sup>70</sup> UNHCR Handbook (n 14) 23.

<sup>71</sup> Cooper (n 60) 521.

<sup>72</sup> *ibid*, 522.

<sup>73</sup> David Hodgkinson and others, 'The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change' (2010) 36 *Monash U L Rev* 69, 76.

<sup>74</sup> *ibid*.

<sup>75</sup> Organisation of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) 10 September 1969.

<sup>76</sup> Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the InterAmerican Commission on Human Rights, OAS Doc OEA/Ser.L/V/II .66/doc.10, rev. 1, 190–193 (1984–1985) (Cartagena Declaration).

<sup>77</sup> OAU Convention (n 58) Art 1(2); Cartagena Declaration (n 59) Para III (3).

<sup>78</sup> Shacknove (n 5) 276.

<sup>79</sup> Williams (n 37) 508.

#### **4. Amendment of the refugee convention to recognise climate refugees**

Although the conventional definition of a refugee is obsolete to address the vulnerabilities of growing number of climate displaced people in the modern world, it is argued that this is not the time to reform the Convention. This is because there are three specific challenges of such proposal: firstly, the political unwillingness of the international community; secondly, the potential adverse impacts on the existing Convention refugees; and thirdly, the special characteristics of climate refugees.

Regarding the first argument, the state governments strongly oppose to reform the Convention concerning that it would open the 'refugee floodgate'.<sup>80</sup> Without the support of vast majority of states, the amendment of a Convention is practically impossible. It is known that treaty law is one of the main sources of international law and in case of treaty, it follows negotiation, signing and ratification to take its effect.<sup>81</sup> To date, the reform of the Convention is at negotiation level. There is a vivid non-consensus among states. To illustrate, the Maldives proposed the amendment of Article 1A to expand its scope to address climate refugees in 2006, and after more than a decade it achieved hardly any support from international community.<sup>82</sup> It is again assumed that even it becomes possible to sign a new treaty amending the Refugee Convention; there is barely any chance of its ratification by countries of the global North.

With regard to the second challenge of reforming the Convention, it would devalue the current protection mechanism of refugees.<sup>83</sup> As the UNHCR is the principal body to deal with 'refugees under the Convention, the reform might 'produce a trade-off' between various displaced persons who require separate type of protection.<sup>84</sup> To illustrate, disaster displaced persons do not require the similar type of rights and protection like a politically persecuted refugee since most of them reside within the border of their own country or in a neighbouring country.<sup>85</sup> Therefore, there are several suggestions for sui generis conventions to protect different types of refugees. By way of illustration, the 1998 UN Guiding Principles on IDPs is an attempt to protect all internally displaced people.<sup>86</sup> Again, 2015 Nansen Initiative aims at protecting cross border climate

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<sup>80</sup> *ibid*, 509.

<sup>81</sup> VCLT (n 56) Articles 7-24.

<sup>82</sup> Behrman and Kent (n 6) 4.

<sup>83</sup> David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees' (2004) 16 *Geo Int'l Env'tl L Rev* 209, 215.

<sup>84</sup> Frank Biermann and Ingrid Boas, 'Preparing for warmer world: Towards a global governance system to protect climate refugees' (2010) 10(1) *Glo Env'tl Pol* 60, 74.

<sup>85</sup> *ibid*.

<sup>86</sup> Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998).

change refugees.<sup>87</sup> Finally, a number of researchers including Williams,<sup>88</sup> Bierman and Boas,<sup>89</sup> and Hodgkinson and others<sup>90</sup> suggest protection mechanisms separate from the Refugee Convention for the recognition and protection of the vulnerabilities of climate refugees. It is, therefore, submitted that the attempt to reform the Convention to clothe protection to all persons displaced will undermine the rights of the refugees who are now being governed under the Convention.

About the third challenge for the reform of the Refugee Convention, the issue of the recognition of climate refugees is apparently different from those of political refugees. The climate refugees are mainly displaced internally<sup>91</sup> and therefore, those who claim for the amendment of the Convention disregards the internally displaced climate refugees.<sup>92</sup> Again, the issue of climate refugees is also related with prevention of the climate change and adaptation of the displaced persons. Furthermore, the aspect of vulnerabilities is different in different region of the world. To illustrate, while the island states are under the threat of total loss of statehood, African countries have been suffering in the crisis of water and deforestation.<sup>93</sup> Consequently, the reform of the Refugee Convention will not afford efficacious solution for the climate refugees.

In sum, although it sounds very pleasant to reform the Convention encompassing climate refugees, considering the practical problems of political unwillingness, prospective adverse impacts upon the existing recognised refugees and both internal and international displacement of climate refugees, it is submitted that the reform of the Refugee Convention would not serve the purpose of recognising vulnerabilities of climate refugees.

## **5. Conclusion**

The study argues that despite the Protocol removed the geographical and temporal limitations of the Convention, the definition of refugee as provided in the Convention is outdated. Owing to the requirement of alienage, a good number of internally dislocated persons are left beyond the protection of the

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<sup>87</sup> Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change Volume 1 (The Nansen Initiative 2015).

<sup>88</sup> Williams (n 37) 502.

<sup>89</sup> Bierman and Boas (n 84) 74.

<sup>90</sup> Hodgkinson and others (n 73) 69.

<sup>91</sup> IDMC (n 41).

<sup>92</sup> Williams (n 37) 65.

<sup>93</sup> Walter Kälin and Nina Schrepfer, 'Protecting people crossing borders in the context of climate change: Normative gaps and possible approaches' (2011) Study on behalf of the Swiss Ministry of Foreign Affairs (Political Division IV) <[https://www.shareweb.ch/site/Migration/Resources\\_Migration/library/...resourcessharewebResource\\_en\\_9245.pdf](https://www.shareweb.ch/site/Migration/Resources_Migration/library/...resourcessharewebResource_en_9245.pdf) p 13> accessed on 24 July 2020.

Convention. Moreover, for the restricted meaning of persecution, the people who are forced to flee being persecuted by circumstances other than those directly caused by their government cannot seek the protection of the Convention. In addition, the reasons for such persecution are confined to race, religion, nationality, political opinion and membership to particular social group. Among these limited reasons of persecution, the 'social group' is sometimes alleged the widest one and attempted to extend to all displaced persons. This attempt is, however, vitiated as it is not supported by the objective of the Convention. Consequently, the definition of the Convention describing refugees has become outdated. Nevertheless, the amendment of the Convention is not suggested because of some pragmatic challenges. Notably, the reform will adversely impact the existing recognised refugees since the refugee regime is based on the concept of political refugees in the one hand and the diversity of the reasons of displacement in modern times, on the other. Furthermore, the international community has also less appetite for reforming the Convention. It is therefore highlighted to establish separate mechanisms for the protection and recognition of various climate refugees leaving the Convention to continue its existing definition of refugees. It is worth noting although there are a number of proposals from different researchers to recognise climate refugees,<sup>94</sup> no study is still adopted at international legal regime. As such, further study is suggested to identify or propose the proper mechanism to overcome the crisis of the recognition of climate refugees at international level.

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<sup>94</sup> Williams (n 37) 502; Biermann and Boas (n 9) 60; Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *HarvEnvtl L Rev* 349; Hodgkinson and others (n 73) 69; Michel Prieur, 'Draft convention on the international status of environmentally-displaced persons' (2010) *Urban Lawyer* 247.