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# Protection of Climate Change Refugee: the case of Horn of Africa

The need for new international protocol

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## Table of contents

<b>ABSTRACT</b> .....	<b>IV</b>
<b>LIST OF ACRONYMS</b> .....	<b>V</b>
<b>ACKNOWLEDGMENTS</b> .....	<b>VI</b>
<b>1 INTRODUCTION</b> .....	<b>1</b>
1.1 Background .....	1
1.2 Statement of the problem .....	4
1.3 Objectives.....	4
1.4 Research questions .....	5
1.5 Methodology .....	5
<b>2 CLIMATE CHANGE AND DISPLACEMENT NEXUS</b> .....	<b>6</b>
2.1 Climate change defined.....	6
2.2 Link of climate change and human displacement .....	7
2.3 Displaced persons, refugees or migrants: the definition debate.....	10
2.3.1 Internal or cross border? Perspective of climate change induced displacement .....	15
<b>3 CLIMATE CHANGE REFUGEES PROTECTION</b> .....	<b>18</b>
3.1 Scope of climate change effect in the Horn of Africa.....	18
3.2 The limits of international refugee laws.....	22
3.2.1 The 1951 UN convention and 1967 protocol relating to the status of refugee .....	23

3.2.2	The 1984 Cartagena declaration.....	25
3.2.3	The 1969 OAU refugee convention .....	26
3.3	Persecution in light of climate refugees .....	26
3.4	Non-refoulement as a complementary form of protection.....	29
3.5	State practice in treatment of climate refugees .....	32
<b>4</b>	<b>FILLING THE GAP: SEARCHING FOR APPROPRIATE REGIME .....</b>	<b>35</b>
4.1	The United Nations framework convention on climate change (UNFCCC).....	35
4.2	Adaptation and mitigation as a response to climate change refugees.....	36
4.3	The Warsaw international mechanism for loss and damage.....	38
4.4	A global problem that needs a global response.....	39
4.5	Common but differentiated responsibilities and respective capabilities.....	41
4.6	Paris “last chance” to take action: Hope for climate refugees .....	43
4.7	Implementation: collective approach .....	45
<b>5</b>	<b>CONCLUSIONS .....</b>	<b>48</b>
<b>6</b>	<b>BIBLIOGRAPHY .....</b>	<b>51</b>

## **Abstract**

Studies show that the devastating effect of climate change results in displacement of people throughout the world. The causal link between climate change and displacement is greatly disputed among scholars, it is undeniable facts that, developing countries, which are less responsible for climate change, suffer from the effects of climate change and are forced to bear the greatest burden of providing protection for climate refugees. The increasing cross-border displaced persons are not getting appropriate protection from today's international laws, as they don't fall under the refugee definition provided by the existing international and regional refugee conventions. However, there have been arguments among scholars in the necessity of new laws to govern such new category of refugees. Accordingly, in order to provide adequate legal protection, proposals have been made for sharing responsibility among the developed countries, which are most responsible for causing climate change. Fortunately, opportunities are at hand that the international community may come up with possible solutions at the final climate change negotiation scheduled to be held in December 2015 in Paris. Therefore, this thesis will analyze whether the existing laws are able to extend their protection to climate induced refugees in the form of complimentary protection or the necessity for having new laws that will govern such new category of refugees.

## **List of Acronyms**

CBDR- Common but Differentiated Responsibilities  
CEGIS- Center for Environmental and Geographic Information Service  
COP- Conference of Parties  
ECHR- European Court of Human Rights  
FAO- Food and Agriculture Organization  
GHG- greenhouse gas  
ICRC- International Committee of the Red Cross  
IDMC- international displacement monitoring center  
IDP- Internally Displaced Persons  
IFRC- International Federation of Red Cross and Red Crescent  
IOM- International Organization for Migration  
IPCC- Intergovernmental Panel on Climate Change  
NGO- Non Governmental Organizations  
NRC- Norwegian Refugee Council  
OAU- The Organization of African Unity  
UN- United Nations  
UN-Habitat- United Nations Human Settlements Programme  
UNDP- United Nations Development Programme  
UNFCCC- United nations Framework Convention on Climate Change  
UNHCR- United Nations Higher Commissioner  
UNOCHA- United Nations for the Coordination of Humanitarian Affairs  
WHO- World Health Organization

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# 1 Introduction

## 1.1 Background

Climate change has been recognized as a challenge to human life and nature. Climate change related disasters such as drought, floods, dust storm, tsunamis and hurricanes have displaced people from their homes in many countries.<sup>1</sup> According to the intergovernmental Panel on Climate Change, Climate-related hazards affect poor people's lives directly through impacts on livelihoods, reductions in crop yields, or destruction of homes and indirectly through, for example, increased food prices and food insecurity.<sup>2</sup>

Displacement in Africa is complex. People are displaced for different reasons some because of conflict, some because of disasters and some are evicted for urban renewal projects while still others are displaced because of large-scale development projects. In comparison with conventional refugees, cross border displaced persons have received much less international attention even though their numbers are far higher than refugees. Recently, displacement related to climate change is recognized as the major problem in the Africa in general and in the Horn of Africa in particular. Climate change displacement movements are often internal displacements within the national areas, although there is an increasing trend showing that many people tend to cross the national border of their home countries. Similarly, there is a growing certainty and evidence that, as the climate change consequences affect the livelihoods of people particularly in developing nations, and the most vulnerable communities and populations will be the worst affected.<sup>3</sup>

There have been some legal instruments implemented to regulate the internal displacement of people at international and regional levels. Those are the UN guiding principles on the internal displacement of people (IDPS) and the Kampala convention on IDPs that is applicable only to

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<sup>1</sup> McAdam, J. (2012), Climate Change, Forced Migration, and International Law P. 21

<sup>2</sup> Inter-governmental panel on climate change (IPCC 2014), Summary for policymakers. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability*. P 7

<sup>3</sup> UNHCR, Chairperson's summary, (2011), Nansen conference on climate change and Displacement in the 21<sup>st</sup> century Paragraph 2

IDPs in Africa. Currently, it is well acknowledged at least legally, the guiding principles on internal displacement and, more recently, the African Union's Kampala Convention on IDPs, the first binding international treaty on internal displacement, provide important human rights protections for people displaced owing to environmental or natural-disaster related factors.<sup>4</sup>

These guiding principles on internal displacement are an important guide in this regard and are generally considered as providing an adequate legal framework on the recognition of right of internally displaced persons.<sup>5</sup> It was noted on the chairperson's summary that, there is no need for a new set of principles in relation to internal displacement in the context of climate change.<sup>6</sup> However, scholars and researchers argued that, there is an absence of clear laws or perhaps no laws that are applicable to persons who need protection due to cross border displacement owing to climate change from their home countries. In recognition of this shortcoming, the Nansen Initiative adopts different principles that can address the protection issues in connection to externally displaced person.<sup>7</sup> This initiative also holds different regional consultations to develop the agenda of its initiative towards the protection of internationally displaced persons due to natural hazards and effects of climate change.

In other words, the issues related to the admission and protection of internationally or cross border displaced persons into another country have not been fully addressed in the existing international and regional laws. Even though some researchers argued that the 1951 convention and the two regional refugee law instruments namely, the OAU convention on the status of refugee and Cartagena Declaration contains a number of principles that may be applicable to persons who flee due to climate change.

For instance, Kolmannskog argued "when we apply a dynamic and context-oriented interpretation, the 1951 Convention relating to the status of refugees and regional refugee

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<sup>4</sup> UNHCR (2013) international conference: Millions of people without protection: climate change induced displacement in developing countries. Challenges relating to climate induced displacement P. 9

<sup>5</sup> Ibid

<sup>6</sup> supra note 3

<sup>7</sup> Ibid



instruments remain relevant for some of those who are cross-border displaced”.<sup>8</sup> Accordingly, he argued that the refugee conventions have the possibility to apply to internationally displaced persons due to climate change on the basis of dynamic and contextual interpretation of the convention. On the contrary, some argue that both the 1951 refugee convention and the remaining two regional refugee conventions have little or no room to protect displaced persons owing to climate change. Because those international refugee law instruments are limited to persecution associated to the five grounds listed under article 1(2) of the 1951 convention: “refugee as a person who to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; 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”. This will be dealt in detail in the coming sections.

This thesis seeks to clarify the possibilities to extend protection to climate change refugee from the international human right instruments and the international climate change frameworks. Despite the available provisions that can potentially applicable to climate change refugees, state practice showed that, states are reluctant to extend such protection. Current data and situations indicate the urgency to respond the need for climate change refugees.

With this objective in mind, the thesis is designed to provide a contextual analysis on the debate of new category of refugee, and possible solutions to fill the protection gap. The thesis is divided into four chapters. Part one deal with background information, statement of the problem, research question and methodology. Part two examines the issues related to the debates on climate change refugees and school of thoughts. Part three analyzes the limits of the current international refugee law protection and suggests the appropriate forum for providing adequate legal protection to the climate refugees. On the other hand chapter four deals with the international climate change legal instruments and suggests the forthcoming climate change negotiation that will be held in Paris should be used as a fertile ground to

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<sup>8</sup> Kolmannskog V. (2013), “We are in Between”: Case studies on the protection of Somalis displaced to Kenya and Egypt during the 2001 and 2012 drought, P. 6

provide solutions for increasing number of climate change refugees throughout the world. Finally, part five presents the conclusions.

## **1.2 Statement of the problem**

Africa is one of the regions of the world where the effects of climate change are being seriously felt. The impacts of climate change in many African countries are exacerbated by many factors including extreme poverty, high population growth rate, lack of good governance and distributive justice within the region.

In recent years, governments are aware of the effects of climate change as displacement occurring due to climate change particularly in the Horn of Africa. However, the actions taken by governments found to be inadequate and not far-reaching to address cross border climate change displacement. Some scholars have proposed possible solutions in order to secure effective rights for persons displaced in the context of climate change and natural disasters. They argue that expanding the interpretation of international human right instruments would be enough to protect the right of those persons because the right and effective legal status of displaced persons in general are at best unclear.<sup>9</sup> Others also argue in support of this, claiming that having a unique and separate law that governs the right of cross bordered displaced persons due to climate change is not acknowledged by the international community yet. Thus, this study is initiated to investigate the need for a separate law that protects the rights to cross border displaced persons due to climate change.

## **1.3 Objectives**

- To identify and clarify whether available legal international human right instruments and frameworks are able to extend protection to climate change refugees or the necessity of new separate laws.
- To add knowledge on the protection gaps of cross border displaced persons.

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<sup>9</sup> Ibid

#### **1.4 Research questions**

- Is there a need for a new international protocol to protect the rights of persons displaced by climate change?

#### **1.5 Methodology**

In this thesis, I used the major international and regional instruments dealing with the protection of displaced persons and the climate change convention and protocols. I examined the applicable legal instruments and policies towards the protection of the right of internationally displaced persons in the world in general in the horn of Africa in particular. In addition, books and articles written by scholars in the subject matter were used as part of the literature review of the thesis. Available data in relation to cross border displaced persons from East Africa was also used.

## **2 Climate change and displacement nexus**

This chapter starts by giving an overview of climate change, specifically pointing out debates within the terminology, definition of climate or environmental refugees and its nexus with climate change.

### **2.1 Climate change defined**

The world mostly agrees that something needs to be done to regulate the global warming and climate change. Consequently, it has been trying to get an agreement on a framework that subsequently controls the climate change regime. The United Nations Framework Convention on Climate Change here in after refers as (UNFCCC), signed by over 150 countries at the Rio Earth Summit in 1992. This climate change convention defined the term climate change under its article 1 paragraph 2 as follow:

*Climate change refers to a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.*<sup>10</sup>

Under this climate convention, the change that will happen to the climate is attributed directly or indirectly to the activities of human beings. It is useful to note that, the definition of climate change under UNFCCC is more restrictive and limited as it is only attributable directly or indirectly to human activities. In other words, as stated under article 2 of the UNFCCC the ultimate objectives of the framework convention is to prevent dangerous anthropogenic or human cause interference to the climate system.

In addition to this, the Intergovernmental Panel on Climate Change here in after refers as (IPCC) describes climate change in its fourth assessment report as climate change refers to a change in the state of the climate that can be identified through using statistical tests by

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<sup>10</sup> See United Nations Framework Convention on Climate Change, UNFCCC (1992), Article 1(2) and article 2 respectively.

changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer.<sup>11</sup>

The causes of climate change under the UNFCCC and IPCC definitions are similarly attributed to human activities and natural variability. In addition to this the IPCC fifth assessment report strength the connectivity of human activity with the alarming climate change by stating that, human influence on the climate system is clear.<sup>12</sup> This is evident from the increasing greenhouse gas concentrations in the atmosphere, positive radiative forcing, observed warming, and understanding of the climate system. It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.<sup>13</sup>

Most of researchers argued that, the definition of climate change by the UNFCCC clearly focuses on the anthropogenic effects on the environment. That is to say, gases or materials that stem from human activities, heavily affected the environment. This inclusion of human activities as a cause to climate change will importantly help to understand how activities in the past and present are contributing to climate change and complied to change these activities through adaptation and mitigation programs.<sup>14</sup> Moreover, it is not to say that countries are totally prohibited from greenhouse gas (GHG) emissions rather they are obliged to reduce and stabilize their amount of emission and in the absence of observing their commitments they will be liable for their emission.

## **2.2 Link of climate change and human displacement**

Climate change has been the point of discussion and intense debate within the scientific community.<sup>15</sup> However, insufficient attention has been given to the humanitarian consequences that projected and will be likely to occur in the life of people due to climate change.<sup>16</sup>

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<sup>11</sup> See IPCC (2007), fourth assessment report, climate change 2007: Impacts, Adaptation and Vulnerability synthesis report, paragraph 2

<sup>12</sup>Supra note 2 P. 4

<sup>13</sup> ibid

<sup>14</sup> Brooking-LSE (2014) Project on Internal Displacement: Climate Change and Displacement. P. 3

<sup>15</sup> UNHCR (2008), Climate change, natural disasters and human displacement: A UNHCR perspective. P. 3

<sup>16</sup> Ibid

It is established fact that climate change already undermines the quality of livelihoods and security of many people around the world. In early 1990s, the UN's Intergovernmental Panel on Climate Change (IPCC) declared that the greatest effects of climate change would likely be on human migration, with millions of people uprooted by shoreline erosion, coastal flooding, and agricultural disruption.<sup>17</sup>

According to this report, by 2050 the effects of climate change both sudden and slow onset could displace 150 million people throughout the world.<sup>18</sup> The question of how many people are likely to be displaced has been debated among researchers. However, Scholars believed that Professor Norman Myers gave the best estimation on the future displacement of people owing to climate change.

According to Myres's estimation, 200 million people will be displaced from their home by 2015 due to climate change.<sup>19</sup> A recently released report by the international displacement monitoring center (IDMC) and the Norwegian Refugee Council indicated that, 22 million people were newly displaced by disasters in 2013.<sup>20</sup> This estimation is related to disasters triggered by both weather related and geographical hazard events, such as flood, storm, earthquakes, volcanic eruptions and wildfires. Displacement related to slower-onset type hazards such as drought, as well as technological hazards (such as nuclear or industrial accidents) and biological hazards (such as epidemics) are not included in these global estimates for methodological reasons.<sup>21</sup>

Some researchers suggest that the above-mentioned slow onset environmental changes can negatively affect livelihood systems and contribute to migration pressures in the long term but harder to observe within short time. The occurrence of migration related to slow onset events is more challenging to identify because the impacts of the environmental event incremental,

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<sup>17</sup> See IPCC (1990), Climate Change: The IPCC scientific assessment: report prepared for IPCC by working group I

<sup>18</sup> Ibid

<sup>19</sup> Morrissey J. (2009) Environmental change and forced migration: A state of the art review P. 4

<sup>20</sup> see International Displacement Monitoring centre, IDMC ( 2014) "global Estimates: people displaced by disaster, September 2014 available at <http://www.internal-displacement.org/publications/2014/global-estimates-2014-people-displaced-by-disasters/>

<sup>21</sup> Ibid

and seldom reported by the media until they become acute crises.<sup>22</sup> It is also useful to bear in mind, that the above estimated number of displaced persons is limited to internal displaced persons due to sudden onset effects of climate change. However, it has been argued that estimates on the number of internally displaced persons continue to be controversial and there is no universal agreement on the estimates due to methodological and practical problems.<sup>23</sup> Indeed, it will not be difficult to assume what will be the estimation on the number of displaced persons if cross-border displaced persons are also included in the study.

Above and beyond, scholars and researchers have generally agreed on the fact that climate change will result in large-scale of displacement of people and developing countries will bear the greatest costs of it.<sup>24</sup> There may be increased danger of violent conflicts and wars, within and between states.<sup>25</sup> Other researches also indicated that increasing number of displaced persons might also be the greatest factor for conflicts over scarce resources and border conflicts.<sup>26</sup>

Although scholars agree that displacement could be the single effect of climate change, however, again it has been an issue of debating among scholars about the causal link of climate change and causes of displacement. Scholars argued that there is no direct relationship between climate change and displacement of persons by providing that; climate change per se cannot be a sole cause for migration or displacement rather other factors should be included as causes of displacement. On the contrary others argued that the links between climate and human migration are not new. The droughts of the 1930s in the plains of the American Dust Bowl forced hundreds of thousands of migrants towards California, and those that struck the Sahel between 1969 and 1974 displaced millions of farmers and nomads towards the cities<sup>27</sup>

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<sup>22</sup> Forced migration online: (2008), A world of information on human displacement available at <http://www.forcedmigration.org>

<sup>23</sup> ibid

<sup>24</sup> Supra note 13 P.1

<sup>25</sup> Voigt (2009) Security in a “Warming World” Competence of the UN Security Council to prevent dangerous of climate change. P. 291

<sup>26</sup> Warnecke A. and others ( 2010), Climate change, migration and conflict: Receiving communities under pressure P.2

<sup>27</sup> Piguet (2008) new issues in refugee research: Climate change and forced migration, research paper No. 153 UNHCR P. 1

are best evidences of the existence of casual link between climate change and human migration.

Likewise, there are many well-known cases of mass population departures, in particular in Africa (Sahel, Ethiopia) but also in South America (Argentine, Brazil), in the Middle East (Syria, Iran), in Central Asia and in Southern Asia.<sup>28</sup> Traditionally, as natural resources become exhausted within one area, seasons change, agricultural crops become depleted, people have relocated in order to better avail themselves of local natural resources. Furthermore, displacement and forced migration also occur due to one-off natural disaster events.<sup>29</sup> The above two and opposing views of climate change linked to displacement are elaborated under the forthcoming sections.

### **2.3 Displaced persons, refugees or migrants: the definition debate**

The term displacement is used to describe a kind of forcible movement that applies both to those forced to cross the border of their countries and who are forced to leave their communities but who will still remain within the borders of their countries.<sup>30</sup> A separate definition of the two components of displacement will be discussed as follow:

Internally displaced persons (IDPs) are defined under the United Nations guiding principle on internally displaced persons as *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 conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.*<sup>31</sup>

The definition of internally displaced persons has gained acceptance by the international community over the past decades. In this regard, the African Union has taken an important

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<sup>28</sup> id P. 6

<sup>29</sup> Angela Williams (2008), Turning the Tide: Recognizing Climate Change Refugees in International Law. P. 507

<sup>30</sup> Study report by Canter for Environmental and Geographic Information Service (CEGIS)Bangladesh:(2014) trend and impacts of disaster and climate change P. 7

<sup>31</sup> See Princilple 1 of the 1998 UN guiding principle on Internally displaced persons



step in developing a binding legal instrument, which will require state parties to adopt laws and policies to prevent displacement, to protect and assist those who are displaced, and to find solutions to displacement. As a result, the Kampala convention on the right of internal displaced persons (IDPs)- adopted the following definition under its article 1: “*internally Displaced Persons means 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 conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border*”.<sup>32</sup> Both definitions of internally displaced persons have addressed the coercive or involuntary nature of the movement with a number of broad factors of displacement such as conflict, violation of human rights and natural and man-made disasters.

It is useful to bear in mind that, the definition of internally displaced persons is no longer a mere descriptive or operational<sup>33</sup>, but it has also acquired the legal status and normative dimension through the Kampala convention.<sup>34</sup> Hence, it could be convincingly argued that unlike the definition on cross border displaced persons, it is no longer a controversial point among researchers and scholars.

Unlike the nature and definition of internally displaced persons, the definitions and nature of cross border or internationally displaced persons is subject of controversies among scholars and researchers. Thus, Suhrke identified two schools of thoughts from the different literatures on environmental change and displacement. Suhrke, called the two different and opposing perspectives as *minimalist* and *maximalist* views.<sup>35</sup>

Essam El-Hinnawi is categorized among the maximalist school of thought authors.<sup>36</sup> Most of the environmental and international refugee law scholars argued that the term environmental refugee is perceived as first coined by Essam El-Hinnawi in 1985. However writers argued

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<sup>32</sup> See article 1 of the 2009 Kampala Convention on the right of internally displaced persons

<sup>33</sup> Bilková V. (2011), towards a personal right to reparation for Internally Displaced Persons? P.97

<sup>34</sup> *ibid*

<sup>35</sup> Suhrke (1993), Pressure Points: Environmental Degradation, Migration and Conflict P. 3

<sup>36</sup> *Ibid*

that the terms of initial use may be as early as the 1970s when it was first invoked by Lester Brown, the founder of watch Institute.<sup>37</sup> However, it is true that in 1985 that the El-Hinnawi paper brought the term into public debate and being popular term in the international arena.<sup>38</sup>

The first formal definition of environmental refugee provided by El-Hinnawi provides a formal definition of environmental refugees. Hence he defined *environmental refugee as environmental refugees as those people who have been forced to leave their traditional habitat, temporary or permanently because of marked environmental disruption natural or human activities that jeopardized their existence and for seriously affected the quality of their life.*<sup>39</sup>

On the other hand, Norman Myers, the most prolific writer on this area defined environmental refugee as persons who can no longer gain a secure livelihood in their traditional homelands because of environmental factors of unusual scope.<sup>40</sup> However the above founding definitions of environmental refugees have been subject to criticism by deferent scholars and researchers. They were criticized for their luck of detailed explanations of the elements included in the definition and the luck of linkage between the definition of environmental refugee and climate change.<sup>41</sup>

Assen and Rosenfeld argues that the definitions by El-Hinnawi and Myers of the term environmental or climate refugees have only produced statements establishing straightforward linkage between environmental changes and migration but failed provided evidence of the existence of casual link between climate change and refugees. Certainly, *when looking at migration, it is difficult to isolate one cause of displacement as the phenomenon always entails a mixture of push and pull factors. Therefore, economic, political and social contexts of a specific case as well as other determinants will shape into a decision to leave.*<sup>42</sup>

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<sup>37</sup> Morrissey J. (2012) Rethinking the “debate on environmental refugees”: from maximalist and minimalist to “proponents and critics” P. 37

<sup>38</sup> Ibid

<sup>39</sup> Supra note 18 P.3

<sup>40</sup> Id P. 4

<sup>41</sup> ibid

<sup>42</sup> Assen and Rosenfeld (2012) Environmentally induced migration, vulnerability and human security: Consensus, controversies and conceptual gaps for policy analysis P. 1049

Apart from this, Bates criticized the definition of environmental refugee by El-Hinnawi as it did not provide generic criteria distinguishing environmental refugees from other types of migrants and his definition makes no distinction between refugees themselves. Therefore many people can be classified under the umbrella of refugee and will be problematic to extend protection for all.<sup>43</sup>

The maximalist view proponent authors categorized on the base of that they tend to extract the environmental variable from a cluster of causes associated outmigration as a direct result of environmental degradation and climate change and strongly suggests that climate change directly causes people to be forced to move. This school of thought proponent authors expects hundreds of millions, or even up to a billion, people to be displaced as a consequence of climate change.<sup>44</sup> This view arguing that environmental degradation has already displaced millions of people and more displacement is on the way.<sup>45</sup> Accordingly this view stated that the international community should accord a protection towards those displaced persons by considering the risk of further flood displacement. This view has been subject to criticism due to the fact its narrow view of analysis as to describing climate change and environmental degradation is a sole cause of migration.

Increasingly, climate change is seen as being responsible for the displacement of individuals, communities, and, in some cases, entire nations, as the impacts of our changing climate are more widely and intensely felt. However, the plight of so-called “climate change refugees” continues largely unrecognized and mostly devoid of support by the international community.<sup>46</sup> Due to debates over the definitions of climate or environmental refugees, the debate between the two views also extended to the effects of climate change.

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<sup>43</sup> Bates D. (2002) Environmental Refugees? Classifying Human Migrations Caused by Environmental Change P. 466

<sup>44</sup> Warner.K and Schrepfer.N (2012), Protecting People Crossing Border in the Context of Climate Change: Normative Gaps and Possible Approaches. P. 11

<sup>45</sup> supra note 34 P. 4

<sup>46</sup> Supra note 28 P. 502

Thus the minimalist school of thought strongly argued that, climate change and environmental degradation by itself is not important cause of migration.<sup>47</sup> In other words, people are intended to migrate on the mixture of social, political and economic factors. In addition they argued that since the maximalist view doesn't make any distinguishing between internal and external displacement of people such broad category will invite large number of estimation and undermines the meaning and protection nexus of refugee.

Unlike the opposing definitions of climate refugees the international organization for migration (IOM) adopts an inclusive definition as follow; *Environmental migrants are persons or group who for reason of sudden or progressive changes in the environmental that adversely affects their lives or living conditions, are obliged to leave their habitual homes or choose to do so, either temporary or permanently, and who move either within their territory or abroad.*<sup>48</sup> According to IOM, the purpose of the definition is to include population movements regardless of its temporary or permanent, internal or cross border whether it is be forced or voluntary or on the account of sudden or slow environmental change.

The terms and concepts such as environmental migration, climate change-induced migration, ecological or environmental refugees, climate change migrants and environmentally induced forced migrants are found scattered throughout the literatures. The main reason for the lack of definition relating to migration caused by environmental degradation or change is linked to the difficulty of isolating environmental factors from other drivers of migration. Another major hindrance lies in the confusion of involuntary versus voluntary movement of people.<sup>49</sup>

Although those scholars and IOM develop definitions, the international community has shown clear rejection of the term environmental or climate refugees on the Chairperson's summary of the high-level 2011 Nansen Conference on climate change and displacement in the 21<sup>st</sup> Century,<sup>50</sup> by concluding that "the term climate refugee or environmental refugee should be avoided, as they are legally inaccurate and misleading". However, they give stress on the

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<sup>47</sup> Id P.5

<sup>48</sup> Laczro and Aghazarm (2009): IOM, Migration, environment and climate change: Assessing the evidence P.19

<sup>49</sup> couldry and Herson (2008), Climate change and displacement : Forced Migration Review. P. 10

<sup>50</sup> Supra note 1 P.21

clarification of legal terms related to displacement of persons related to climate change and other natural hazards. As a matter of suggestion these persons can be called as environmentally displaced persons.<sup>51</sup>

### **2.3.1 Internal or cross border? Perspective of climate change induced displacement**

Many scholars have agreed that the vast majority of people displaced by the impacts of climate change are internal. Form one of the leading scholars of international refugee law; Professor McAdam argued that it is conceptually problematic and empirically flawed to suggest that climate change alone cause migration.<sup>52</sup> It is best described as a threat multiplier, which exacerbates existing Scio-economic or environmental vulnerabilities.<sup>53</sup> According to Macadam, that is not to say climate change cannot cause displacement rather climate related movement is likely to be more of internal and gradual.<sup>54</sup> At the same time there will be cross border movement and displacement but will not reach the level of predicted figure by scholars as discussed in the previous sections of this thesis.<sup>55</sup>

Most of the scholars and writers who argued climate change causes internal displacement, they try to intend that the international community may not be in necessary issue new laws to protect the climate refugees and displaced persons since those displaced persons are primarily get protection from their state as far as they don't cross the international border. The proponents of this idea support their argument by stating that even though those people want to migrate and need to cross their border they will not be in position to migrate due to their economic, education and lack of migration channels. Therefore they will remain to settle within part of their home country.

Similarly in support of this argument Alex argued that, when people move because of the impacts of climate change, they tend to move within their own country. This is clear from testimonies of people fleeing recent disasters in the Philippines:

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<sup>51</sup> Supra note 3

<sup>52</sup> Supra note 1 P.24

<sup>53</sup> Id P. 20

<sup>54</sup> Id P. 16

<sup>55</sup> Ibid

*“I lost one of my grandchildren and my younger sister. Early the next morning, rescue workers came with boats and they took us to an evacuation center.” “We were trapped in the house for two days until someone came and rescued us in a boat, and we were taken to the local gymnasium that was being used as an evacuation center. We stayed there for a week but it was so crowded that we decided to leave and go back to the ruins of our house.”*<sup>56</sup>

Alex notes, these testimonies are a good illustration of the evidence on movement during disasters. People move very short distances, without crossing international borders and often return to their homes as soon as possible. Slowly unfolding disasters like droughts, changing rainfall and desertification create different patterns of movement. It is often internal, and often from the countryside to cities. When people do cross a border, it is often to find work. Although climate change might be among the factors causing their movement, their primary motivator is employment.<sup>57</sup> Another problem imaged from the perception of the people or indigenous community. For instance the pacific islanders reject the climate refugee status rather they want to migrate with dignity. This is to mean that they don't want protection on the account of refugee rather they want to be treated as immigrant workers by the international community.<sup>58</sup> This statement is drawn from the interview of Kiribati's president Anote Tong. He predicted that rising sea levels will make the island nation uninhabitable in 30-60 years. However the president indicated that:

*“I have never encouraged the status of our people being refugees ... We have to acknowledge the reality that with the rising sea, the land area available for our populations will be considerably reduced and we cannot accommodate all of them, so some of them have to go somewhere, but not as refugees.” As McAdam explain to the ABC news” they see refugee as a negative term that connotes victimhood and people in need of protection by the international community”.*<sup>59</sup>

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<sup>56</sup> Alex Randall (2014) Don't call them "refugee": Why Climate Change Victims need a different label. The Guardian 18 September 2014

<sup>57</sup> ibid

<sup>58</sup> ABC news (2014), Pacific Islanders reject climate refugee status want to migrate with dignity, 6 September 2014.

<sup>59</sup> Ibid

On the other hand, IOM recognize that environmental migration may take place internally, regionally or internationally. Most empirical research, however, tends to suggest that internal migration, such as rural-urban migration, or movement across immediate borders between neighboring countries, is likely to be predominant.<sup>60</sup>

To conclude, while climate change is likely to have large impacts, most impacts are likely cause massive human displacement. Despite this fact, two extreme arguments articulated by scholars, on the nexus of climate change and human displacement. The lack of empirical research in the area has contributes a lot to the low attention of the international community towards the cross border displaced persons protection. It has been argued that the displacement is to be more internal and the term climate refugee used to put certain groups on the international political agenda. But is should be understand that questioning about climate change refugees in not only about refugee hood rather a question about human rights, security and humanitarian issues of those affected groups.

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<sup>60</sup> IOM, Migration, climate change and the environment: (2009), A complex nexus available at <http://www.iom.int/cms/en/sites/iom/home/what-we-do/migration-and-climate-change/a-complex-nexus.html>

### 3 Climate change refugees protection

*”No region in the world is more familiar with the negative effects of climate change Such as internal and external displacement than the Horn of Africa”*

#### 3.1 Scope of climate change effect in the Horn of Africa

The history of Africa is fully linked with drought and famines, and it is not possible to understand the history of Horn of Africa without following the innumerable droughts and how they resulted in massive population migrations throughout the continent. The Horn of Africa includes Eritrea, Djibouti, Ethiopia and Somalia.<sup>61</sup> As the poorest region, most countries in Africa already suffer from widespread poverty, political tensions and violent conflict and thus face a terrible struggle when hit by effects of climate change such as sudden and slow onset disasters like floods and drought. These disasters are especially destructive in Horn of Africa because many inhabitants are pastoralists and small-scale farmers with climate-sensitive livelihoods and little education.<sup>62</sup>

The impacts of climate change are felt all across the world but people in Horn of Africa are disproportionately suffer from the negative consequences of climate change. In mid-2011 the world became witness to a drought and wide spread food crisis in the Horn of Africa, which escalated into acute shortages of food, primarily in southern Somalia, northern Kenya, south-eastern Ethiopia and Djibouti.<sup>63</sup> As a result of this, hundreds of thousands of people was displaced, many crossed state border.<sup>64</sup> A current report by the United Nations for the Coordination of Humanitarian Affairs, here in after referred as UNOCHA confirms that, as of March 2013, there were 9,153,973 people displaced in East Africa.<sup>65</sup> Climate change and environmental degradation, armed conflicts and political, economic and food crises continue

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<sup>61</sup> Horn of Africa, Available at <http://global.britannica.com/EBchecked/topic/8135/Horn-of-Africa> last accessed April 10, 2015

<sup>62</sup> Kolmannskog, V. Tamer A. (2014). Disaster-Related Displacement from the Horn of Africa Report No.15. Bonn: United Nations University Institute for Environment and Human Security (UNU-EHS) P. 21

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> United Nations Office for the Coordination of Humanitarian Affairs (2013), Eastern Africa: Displaced Population Report ( issue 14, 30September 2012 – 31 March 2013) available at [www.unocha.org](http://www.unocha.org)



to force people to flee their homes, resulting in a growing need for assistance.<sup>66</sup> The causes and nature of displacement in the East Africa are seen as complex.<sup>67</sup> As a result of this, it is difficult to get the accurate data of persons displaced on the sole cause of climate change.

Most of climate change displacement in the Horn of Africa is known as internal displacement because they settle somewhere else within their country. However, many also flee in search of assistance and protection from neighboring countries. In the current regime and the trend in the Horn of Africa, most of climate refugees are conceptualized as internally displaced persons or irregular migrants. The UNHCR has a variety of programs for such people, even though the Higher Commissioner maintains not to have a specific mandate over them.<sup>68</sup> In addition the current protection regime on the climate and environmentally displaced refugees got only marginal protection, with no specific mandate attached to one or more regional or international organizations.

Various studies showed that, most of the displaced persons in Horn of Africa are farmers and indigenous people whose life is depending on agriculture and cultivation. When the source of their livelihood is damaged due to climate change they don't have any option to stay at that their habitual place of residence. Consequently, they tend to displace from their place of residence as a solution to their survival. According to the study conducted by the Norwegian Refugee Council (NRC), without exception, displaced persons mentioned due to lack of livelihood options as one of the main reasons for leaving their homes and going to Kenya, Egypt or Yemen: Most respondents were pastoralists, small-scale farmers and agro-pastoralists and most Somalis and Ethiopians displaced to Kenya, Egypt and Yemen were influenced in their cross-border movement by natural hazard-related disasters, which interacted with additional social and political factors, such as ethnic and politically based discrimination.<sup>69</sup> Similarly, according to IOM report, the displacement in the Horn of Africa

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<sup>66</sup> IOM, (2013), : report on East Africa and the Horn of Africa available at <http://iom.int/cms/en/sites/iom/home/where-we-work/africa-and-the-middle-east/east-africa.html>

<sup>67</sup> ibid

<sup>68</sup> Biermann F. and Boas I (2010), Preparing for a warmer world: Towards a global governance system to protect climate refugee. P. 73

<sup>69</sup> RNC, report factsheet (2014), Disaster-related displacement from the Horn of Africa: A joint report by the United Nations University and Norwegian Refugee Council

became as a unique migration challenges in the part of Kenya due to the presence of nomadic and semi-nomadic pastoralists in Ethiopia, Kenya, Somalia and Uganda. In effect, the challenge is described as a source for resource-based conflict between and among pastoralist communities.<sup>70</sup> Some researchers suggest that, despite the fact that, pastoralists are displaced to due to effects of climate change, however, the poor borderland demarcation and administration has also impact on the continuing natural resource based conflict in the horn of Africa.

Likewise studies indicated that, the cross border displaced persons are mostly concerned about limited rights to work and lack of livelihood options other concerns included shelter, food security, education, and access to health care, gender-based violence, and durable solutions, such as resettlement. It is evident that many walk for weeks to reach aid in neighboring countries. Some do not survive the harsh journey; the weakest children die along the way as their mothers watch helplessly. Those refugees who make it to Kenya or Ethiopia's camps arrive exhausted, dehydrated and severely malnourished. Child deaths are alarmingly high. The refugees urgently need medical aid and high-protein, high-energy food. They also need clean water, shelter and basic services in the camps.<sup>71</sup>

It is obvious that the neighboring countries are also poor countries and hardly affected by climate change. It is useful to bear in mind, when crossing the border; they face a serious violation of human rights from smugglers and traffickers. Above and beyond, displacement of people became the issues of regional security. Hence, the reports of cross-border extremist activity, arms trafficking, recruitment and training of refugees by rebel groups such as Al-Shabaab of Somalia, and the Oromo Liberation Front of Ethiopia, have been increased. Following the recent attack at the Carissa University, Kenya's Deputy President William Ruto has called the United Nations to close the Dadaab refugee camp and relocate more than 500,000 Somalis.<sup>72</sup>

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<sup>70</sup> *ibid*

<sup>71</sup> UNHCR, Crisis in the Horn of Africa: available at <http://www.unhcr.org/pages/4e1ff4b06.html> Last accessed April 10, 2015

<sup>72</sup> BBC news, 11 April 2015, Kenya tells UN to close Dadaab camp after Carissa attack available at <http://www.bbc.com/news/world-africa-32269944>

Furthermore, in Africa and other developing regions of the world, climate change is a threat to economic growth (due to changes in natural systems and resources), long-term prosperity, as well as the survival of already vulnerable populations.<sup>73</sup> Consequences of this include persistence of economic, social and environmental vulnerabilities particularly for the economic and livelihood sectors. Climate change, variability and associated increased disaster risks are an additional burden to sustainable development in Africa, as well as a threat and impediment to achieving the Millennium Development Goals and sustainable regional peace and security. Africa's human existence and development is under threat from the adverse impacts of climate change its population, ecosystems and unique biodiversity will all be the major victims of global climate change.<sup>74</sup> In addition, Constraints in technological options, limited infrastructure, skills, information and links to markets further heighten vulnerability to climate stresses. Having the economic development of the continent in mind, the loss of arable lands in the Ethiopian highlands, Kenya's arid regions and African great lakes result in reduced agricultural yields and contribute to food insecurity and faced displacement time and time again. Besides, the agro-pastoral communities are subjected to small-scale migration since there is a lack of alternative water and other livelihoods sources.<sup>75</sup>

In response to the drought and famine crisis in the Horn of Africa in 2011, OCHA streamlined its presence in Nairobi into a single office for Eastern Africa. The new hub plays a critical role in providing first-line surge support to crisis-affected countries where there is no OCHA presence, in Kenya, Burundi, Djibouti, Rwanda and Uganda.<sup>76</sup> The humanitarian crisis in Somalia remains among the largest, most protracted and most complex emergencies in the world today. In the year of 2014 about 731,000 Somalis face acute food insecurity despite improvements in some areas of the country. A further 2.3 million people are on the verge of

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<sup>73</sup> African Ministerial Conference on Environment, AMCE (2011), Addressing Climate Change in Africa; A practical guide towards sustainable development. P. 43

<sup>74</sup> See IPCC report (2007) chapter 11 on regional climate projections.

<sup>75</sup> Nzotungicimpaye (2014), Action on inaction on climate change: Potential implications on future moisture availability in the Nile basin. P. 17

<sup>76</sup> See Report from [UN Office for the Coordination of Humanitarian Affairs](#), Somalia Humanitarian Key Messages February 2015

slipping into acute food insecurity, bringing the number of people in need to 3 million. Internally displaced people make up 76 per cent of the people in acute food security.<sup>77</sup>

In Africa, refugee protection, through hospitality and burden sharing, remains a reality in continent, based on tradition, humanity and law. The increases in refugee numbers in certain areas and the pressure of mixed migration movements have, nonetheless, caused some governments to adopt a more restrictive approach to asylum.<sup>78</sup> Most cross border environmentally induced migration will continue the form of south-south migration; there are fewer trends towards large south-north migrations.<sup>79</sup> Indeed, countries in the Horn of Africa are among the world leading refugee recipient countries.

### **3.2 The limits of international refugee laws**

According to Jose Rier, senior advisor of UNHCR there are massive protection challenges raised by climate and environmental related displacement because the 1951 convention on the status of refugee in any way is not applicable to victims of climate change; the truth is there is no international law and agency in the system because no one could have imaged this situation before 60 years ago. Therefore, states should come to an agreement that this issue should be dealt with, and also to come up with the solutions.

Furthermore, Kolmannskog and Afifi suggested that, the protection gap exists at the global level for those displaced by disasters; on the ground at the local and national level it was clear that climate factors interacted with other social and political factors to displace people.<sup>80</sup> Therefore, existing human rights and refugee instruments often remain relevant in the case of disaster-related displacement. The following section elaborates the applicability of the refugee instruments to persons flee persecution from climate change.

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<sup>77</sup> Ibid

<sup>78</sup> United Nations General Assembly, (2012) Report of the United Nations Higher Commissioner for Refugees: Assistance to refugees, returnees and displaced persons in Africa. Paragraph 43.

<sup>79</sup> Mayer B (2009) The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework. P. 393

<sup>80</sup> Kolmannskog and Afifi, (2014), Supra note 62

### 3.2.1 The 1951 UN convention and 1967 protocol relating to the status of refugee

The United Nations Convention Relating to the status of refugee 1951 convention (herein after referred as the 1951 convention) is the first international instrument that specifically regulates the refugee area. According to Article 1(a) (2) of the 1951 convention, term ‘refugee’ shall apply to “any persons who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.<sup>81</sup> The 1967 Protocol relating to the status of refugee removed the first phrase, which represented a temporal limitation on the term, and expanded the Refugee Convention’s protection to all those who meet the qualifications of the remainder of the definition’s elements. Hence, there are five grounds that any person can invoke to get protection under the status of refugee. However, the person should be being prosecuted before or going to be prosecuted due to the above five convention grounds. It is useful to bear in mind that, the elements or grounds listed under article 1(a) (2) of the convention are initial requirements to be qualified for refugee protection. However, it may still be invoked to support extension of the convention to individuals who do not really satisfy the definitional requirements of the convention.<sup>82</sup>

Therefore, the crucial point that this thesis intended to address is, whether climate refugees invoke protection on the basis and criteria of the international refugee convention. A number of international refugee law scholars try to bring different arguments in this regard. Lister argued that, the definition spelled under the 1951 refugee convention does not, in any plausible way,<sup>83</sup> cover people fleeing their homes because of environmental disruption, including disruption caused by climate change. Those fleeing disruption caused by climate change are not plausibly thought of as being persecuted or going to be persecute, and so cannot have a well-founded fear of persecution.<sup>84</sup> Generally speaking, the danger caused by climate change is indiscriminate, and hence the danger faced is not on account of one of the protected grounds race, religion, nationality, and membership in a particular social group, or

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<sup>81</sup> See article 1(2) of the 1951 refugee convention

<sup>82</sup> Goodwin-Gill and McAdam (2007), *The refugee in international law* P. 36

<sup>83</sup> Lister M. (2014), *Climate change refugee* P. 620

<sup>84</sup> *Ibid*

political opinions. As a result of this, it is logically valid to assert the inapplicability of refugee law to climate change or environmental refugees.

In a strict sense the environmental factors that promote or compel for displacement do not represent “*prima facie*” grounds for refugee status. However Cohen and Bradley argued that refugees who have fled for environmental reasons might fit the convention grounds of refugee status. They supported their argument by giving the following example, in case where the applicants for refugee status protection country government intentionally destroy the environment as a tool of persecution.<sup>85</sup> In addition, the 1951 convention may apply in specific situations, where victims of natural disasters flee because their government has consciously withhold or obstructed assistance in order to punish them in one of the five grounds listed under the convention.<sup>86</sup>

To advance protection to those cross border displaced persons, Still, Kolmannskog argued “when we apply a dynamic and context-oriented interpretation, the 1951 Convention relating to the Status of Refugees and regional refugee instruments remain relevant for some of those who are cross-border displaced.”<sup>87</sup> His argument is particularly relevant in case where the displacement contains a mixed motive. In other words those who cross border displaced persons may be subject to the refugee status protection if their climate change migration is mixed with political and ethnic persecutions from state or non-state actors. He supported his argument based on the case study conducted on refugees from Ethiopian and Somalis flee to Yemen.<sup>88</sup> Hence, he elaborated that, in addition to the effects of climate change and decreasing livelihood opportunities in addition to claimed political and ethnic oppression and persecution against their ethnic and identity. On the other hand, the main reasons for leaving Somalia and South Central Somalia in particular, include extreme poverty, generalized violence, serious human rights violations and armed conflicts preventing people from accessing basic needs such as food, medical services, health care and livelihoods.<sup>89</sup> Besides, the 1951 convention and 1967 protocol relating to status of refugee remains the principal

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<sup>85</sup> Cohen and Bradley (2010) Disaster and Displacement: Gap in protection P. 106

<sup>86</sup> Supra note 3, Paragraph 8

<sup>87</sup> Supra note 7

<sup>88</sup> Ibid

<sup>89</sup> Supra note 61, P. 251

instruments benefiting refugees,<sup>90</sup> the regional refugee laws also contributed their role for the development of international refugee law by adopting the definition of refugee and other related principles of protection.

### **3.2.2 The 1984 Cartagena declaration**

The Cartagena Declaration on Refugees bases its principles on the “commitments with regards to refugees” defined which are based on the 1951 UN Refugee Convention and the 1967 Protocol. It was formulated in September 1984 and includes a range of detailed commitments to peace, democratization, regional security and economic co-operation. It also provided for regional committees to evaluate and verify compliance with these commitments. The declaration is a non-binding agreement, which was adopted by the Colloquium on the International Protection of Refugees in Latin America, Mexico and Panama, held at Cartagena, Colombia. Although the Cartagena Declaration is not legally binding, the countries in the region tend to refer to it, and some have incorporated its provisions into national law.<sup>91</sup>

Accordingly, the declaration adopted an extended definition of refugee that covers persons who have fled their country because their lives, their safety or their liberty were threatened by a massive violation of human rights. In addition, the refugee definition of the Cartagena Declaration builds upon the OAU but adds to it the threat of generalized violence; internal aggression; and massive violation of human rights. Unlike the definition in the refugee convention by the African Union, however, a refugee must show a link between herself or himself and the real risk of harm; all applicants must demonstrate that "their lives, safety or freedom have been threatened". This demand is similar to the UN Refugee Convention, which requires individuals to show that they risk persecution as a particular individual rather than in general. Despite that fact that the definition of refugee in the declaration is more extended and broad than that of the 1951 convention, still it is arguably whether it covered climate refugees or not.<sup>92</sup>

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<sup>90</sup> Good Will-Gill and McAdam supra note 82, P. 27

<sup>91</sup> See, Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85)

<sup>92</sup> Sharpe M (2012) The 1969 African refugee convention: Innovation, misconception, and Omissions” P. 98

### **3.2.3 The 1969 OAU refugee convention**

Africa is the only region of the developing world, which adopted a binding, regional refugee law instrument, and protection of internally displaced persons.<sup>93</sup> The 1969 proclaimed it to be the original complement of the 1951 convention. However some argued that the adoption of the 1969 convention applicable to the continent is a reflection of dissatisfaction of the existing global convention among the African countries for its “Euro centric” biases. Further the convention defined the term ‘refugee’ as 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.<sup>94</sup> Wood argued the 1969 OAU convention governing the specific aspects of refugee problem might play a role in addressing cross border displacement in the context of disasters qualified for refugee status under the 1969 convention.<sup>95</sup>

Both definitions, meaning the 1951 and 1969 are employed by UNHCR in its operations in Africa.<sup>96</sup> Some argued that the extended definition of a refugee to persons fleeing events seriously disturbing public order, which may equally apply to persons fleeing sudden-onset disasters. However, this position has yet to be fully tested.<sup>97</sup> Yet, in Africa it has become a common practice to offer temporary but not adequate protection to persons who cross their border due to the effects of climate change.<sup>98</sup>

### **3.3 Persecution in light of climate refugees**

Despite the above three-refugee law definition of refugee relies heavily on the concept of persecution, but none of the above ever defined it. The term persecution is commonly understood as a function of a failure by the State to perform its basic duty of protection to its

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<sup>93</sup> Ibid

<sup>94</sup> See article 1 of OAU 1969 convention Governing the specific Aspects of Refugee Problem in Africa,

<sup>95</sup> Wood T. ( 2014), ‘Protection and Disasters in the Horn of Africa: Norms and practice for addressing cross-border displacement in disaster contexts’ P.12

<sup>96</sup> Supra note 1 P. 102

<sup>97</sup> Supra note 3, paragraph 9

<sup>98</sup> Ibid



own population.<sup>99</sup> In other words, the victim may be subject to persecution of his/her basic and fundamental freedoms by the state or non-state actors. Therefore state may be the prosecutor in this regard or failure to protect the person from persecution by individuals or non-state actors. According to the UNHCR hand book there is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success.

However, it is generally agreed that, in order to constitute "persecution" within the meaning of Article 1 A, acts suffered or feared must: be sufficiently serious, by their nature or their repetition: they must either constitute a basic attack on human rights, for example, life, freedom or physical integrity, or, in the light of all the facts of the case, manifestly preclude the person who has suffered them from continuing to live in his country of origin; be based on one of the grounds mentioned in Article 1 A: race, religion, nationality, membership of a particular social group or political opinions.<sup>100</sup> The origins of persecution is generally the act of a State organ, whether top or local officials, whatever its status in international law, or of parties or organizations controlling the State. Persecution may take the form of the use of brute force, and may also take the form of administrative and/or judicial measures that either have the appearance of legality and are misused for the purposes of persecution, or are carried out in breach of the law.<sup>101</sup>

The lack of proper definition on this term has invited international refugee scholars to develop their own definition of persecution. James Hathaway defined persecution in terms of ‘the sustained or systematic violation of basic human rights demonstrative of a failure of state protection’.<sup>102</sup> According to Hathaway, the phrase well-founded fear of persecution exists when there is serious harm and violation of fundamental rights and freedoms from the part of the government or harassment from non-state actors perhaps could be individuals but when the state fails to prevent such kind of harassment through its machineries.<sup>103</sup> On the other hand, Good Win Gill and Jane McAdam summarize persecution, as it requires the general notion of persecution to be related to developments within the broad field of human rights. Such

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<sup>99</sup> Storey H. (2014) Persecution: Towards working definition. P.481

<sup>100</sup> See article 1(2) of the 1951 refugee convention

<sup>101</sup> Hathaway. J. (1992), The law of refugee status P. 105

<sup>102</sup> *ibid*

<sup>103</sup> *Ibid*

developments, should take the concept of persecution far beyond the grounds spelled out in the 1951 convention. One may note here is that as the refugee convention as living instruments it should be open to new issues and developments in the refugee context.<sup>104</sup>

Another issue is whether the interpretation of persecution the refugee instrument in light of treaty interpretation as stated under the Vienna convention on the law of treaty.<sup>105</sup> In this regard, Wood notes that, since the convention is a human right instrument, it should be benefited from the living instrument of evolutionary approach of treaty interpretation.<sup>106</sup> Therefore, it would be able to include persons displaced owing to disasters. In contrast, some researchers strongly argued that and as noted above, much of the anticipated movement in response to climate change will be internal, and thus will not meet this preliminary requirement of being outside of their country.<sup>107</sup>

Apart from this, there are difficulties in characterizing ‘climate change’ as ‘persecution’. Although adverse climate impacts such as rising sea levels, salination, storms, cyclones, floods and drought are harmful, they do not meet the threshold of ‘persecution’ as this is currently understood in law and state practice. As it clearly discussed in the above section the term persecution for the purpose of determination of refugee status is adopted in a strict sense. This is to mean that, the persecution should be directly related to the unalienable fundamental civil and political rights of individuals. Therefore, with this strict application of the term it is difficult to include the effects of climate change as tools of persecution by state and non-state actors. But this is not to mean that, there are no a number of human rights are affected by climate change displacement, rather there is no explicit human right protection for climate change cross displaced persons and little temporary survival remedy for potential violations.<sup>108</sup>

The other crucial part of the problem in the climate change context is identifying a ‘persecutor’. For example, the governments of Kiribati and Tuvalu are not responsible for

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<sup>104</sup> Sharpe, *supra* note 92

<sup>105</sup> See article 31 of Vienna convention on the law of treaty (1969), article

<sup>106</sup> *Supra* note 94

<sup>107</sup> *Sopra* note 1, P. 12

<sup>108</sup> Nishimura L. (2015), ‘Climate Change Migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies. P. 114

climate change as a whole, nor are they developing policies, which increase its negative impacts on particular sectors of the population. One might argue that the ‘persecutor’ in such a case is the ‘international Community’, and industrialized countries in particular, whose failure to cut greenhouse gas emissions has led to the trouble now being faced. Again, other argued that since the 1951 Convention on refugees is very clear concerning the definition of a refugee: there must be a reasonable fear of persecution, and thus a persecutor. There is no persecutor in the case of "environmental refuge", unless we refine the climate as a person capable of independent actor or persecutor for the purpose of climate change refugee protection. To be clear, convention refugees are going to flee their own government or private actors that the government is unable or unwilling fleeing the effects of climate change is not escaping his or her government, but rather is seeking protection and survival from countries that have contributed to climate change. However, the state practice evidenced that, the international community is unwilling to support and accord protection to those climate refugees no matter how much they contribute to the problem.

In case of Africa though Kolomannskog and Afifi argued that, as effects of climate change causes rural-urban movement, but the human mobility in the region is not only associated with climate change effects of rather mixed migration.<sup>109</sup> That is to say, the displacement of persons is the combination of political and ethnic oppression and persecution particularly from the part of Ethiopia.<sup>110</sup> Therefore, for some of the refugees from the Horn of Africa; the current international and regional refugee laws will be sufficiently applicable to protect those displaced persons. But it is important to bear in mind that, of course, it is true there is a trend for mixed motive of migration but it is also common to displace to search for survival and searching for food and water.

### **3.4 Non-refoulement as a complementary form of protection**

The term complementary protection is not defined in international law, but it is agreed that, complementary forms of protection describes the prohibition on return to a real risk of arbitrary deprivation of life, or to inhuman and degrading treatment. International human rights laws also establish the basis for a number of forms of complementary protection inter

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<sup>109</sup> Kolmannskog V. and Afifi T (2014) Disaster-Related Displaced Somalis and Ethiopian in Yemen P. 251

<sup>110</sup> *ibid*

alia; the Convention Against Torture, the European Convention on Human Rights and international refugee laws. From the preceding discussions, it is clear that the climate refugees are not covered under the international and refugee law instruments. However, one might ask that, can thus displaced persons be subject to the application of non-refoulement principle through the concept of complementary forms of protection. A last potential source of international legal protection for climate migrants might be found in international human rights law.<sup>111</sup> The general rule of non-refoulement provides that an individual should not be returned to a state where there is a real chance that the individual will face persecution, other ill treatment, or torture. Nowadays, the principle of non-refoulement has got the status *jus cogens* under the customary international law. This is to mean that, all states are legally binding to not return individual who seeks protection under the refugee laws whether those states are ratified the refugee conventions or not. As a result, some researchers argued that climate change refugees could be beneficiaries by the complementary forms of protection. That is to say, even though this individual's do not meet the preliminary requirement of refugee status but since there are high risks of violation of human rights if they returned back to their habitual place of residence.

Article 33 of the 1951 convention prohibited contracting states from returning, expelling a refugee in any territory where there is a risk that his or her life freedom would be threatened on the convention grounds listed under article 1(2) of the same convention. However, article 33(2) it permits a national security as exception to the principle of non-refoulement. In other words, The benefit of the non-refoulement principle may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>112</sup> In contrast, international refugee law scholars argued that the 1969 OAU convention expands the application of non-refoulement comparing to the 1951 convention. However, Sharpe argues that the 1969 convention does not expand the non-refoulement as is often suggested because

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<sup>111</sup>Mayer B. (2009) The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework. P. 386

<sup>112</sup> See article 33(2) of the 1951 refugee convention

the application of non-refoulement ceases if the individual committed a serious non-political crimes after admission of the host state territory.

In addition, McAdam argued that the 1951 convention would be applicable as “*lex specialis*” for the persons who need international protection but not covered under the refugee definitions of the above-mentioned international and regional refugee law instruments. In other words, according to her, persons who displaced due to climate change can be covered by the refugee convention on the grounds that, if the displaced persons will face irresistible human right violations if they return back. Though McAdam doesn’t list the type of human rights that will rise right to protection through the principle of non refoulement, then it could be argued that since there is no hierarchy among the human rights so protection should be given if the person is believed to be facing a violation of human rights of she or he returns back from where she/her came.<sup>113</sup> But it is a clear fact that climate change poses a direct threat to a wide range of universally recognized human rights. Climate change will affect the human rights to water, food and health, as well as others. The linkages have been recognized because both human rights and the environment are endangered by anthropogenic changes in the climate.

On the other hand the Council of Europe (CE) has also introduced its unique standard of refugee protection that goes beyond the definition of refugee provided by the 1951 refugee convention. The Council of Europe recognized the complimentary protection of refugee as follow: ‘*person eligible for subsidiary protection*’ means a third- country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm such as the death penalty or execution, torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situation of international or internal armed conflict.<sup>114</sup> However, the person may not be being eligible for subsidiary protection where there are serious reasons for considering that:

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<sup>113</sup> Sharpe, supra note, 92

<sup>114</sup> See article 15 of the Council of Europe directive on the standard for the qualification of third-country nationals or stateless persons

the person committing a crime against humanity, peace, against the Charter of United Nations and also if the person constitutes a danger to the community or the security of the member state in which he or she is present.<sup>115</sup>

### **3.5 State practice in treatment of climate refugees**

Hathaway argued that the convention refugee concept has been expanded in practice through the institutional competence of the UNHCR and establishment of regional refugee protection arrangements, and practice of states.<sup>116</sup> However, these developments on the 1951 refugee convention do not constitute formal amendments of the exclusive elements of the refugee convention such as the intention to include climate change as a ground for cross border persons persecution. But states may be expected to consider those developments in determining the extent to which persons outside the strict contractual scope of the convention will be protected as refugees.<sup>117</sup>

The following examples will illustrate there is no common practice in dealing cases with climate refugee. A man from Kiribati, a Pacific island nation, asked a court of appeal in New Zealand to grant him refugee status, claiming that rising sea levels made it too dangerous for him and his family to return home.<sup>118</sup> However, the court of appeal confirms the decision of the tribunal as the Kiribati national is not a climate refugee and should send back to him with his family, where the court believes that the family can “resume their prior substance life with dignity”. The ruling of the appeal court indicated that, the applicant couldn’t satisfy the preliminary definitional requirements of refugee under article 1A (2) of the refugee convention and 1967 protocol respectively.<sup>119</sup> Likewise, the court examined the level and threshold of persecution in light of the 1951 refugee convention. Finally the court found that, the applicant couldn’t stratify the test of persecution and it is also difficult to establish the act of the state to protect him and his family from being prosecuted. That is to say, the violation of failure was on the part of the international community and no political. Therefore, it is difficult to identify

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<sup>115</sup> See article see article 15 and 17 of the European directive on the standard for the qualification of third-country nationals or stateless persons

<sup>116</sup> Hathaway, supra note 100, P.11

<sup>117</sup> Ibid

<sup>118</sup> The Telegraph, November 2013, Kiribati climate change refugee rejected by new Zealand

<sup>119</sup> Ibid

the persecutor in the case of climate refugees, because it is difficult to associate the reason of persecution with a single state or non-state actor's action.

On the other hand, a Tuvalu family has been granted residency permit in New Zealand after claiming to be climate change refugees on humanitarian ground. They claimed that they would be seriously affected if they were forced to return back to their country.<sup>120</sup> Environmental lawyers of New Zealand pointed out, the status of refugee was not given on the ground of the requirements under the international refugee laws rather, the residency permit is granted on the base of humanitarian grounds where climate change as one factor. In addition the court took in to consideration that the Tuvalu family has a strong family tie in New Zealand.<sup>121</sup> That is to say, Climate change isn't the only reason why the family is being allowed to stay: the family has three generations of relatives living in New Zealand and the children were born there.

On the other hand the state practice from African countries showed that, refugee receiving African countries rarely declare that they are acting pursuant to their OAU convention obligation. For example, in 2002, the government of Uganda took the view that people fleeing the eruption of *Mount Nyiragongo* in nearby Goma, Democratic Republic of Congo, were not refugees, even under the regional expanded refugee definition, though it still afforded them temporary refuge within its borders.<sup>122</sup> These examples of state practice provide useful illustrations of current approaches to climate change refugee protection in practice and we can conclude that there is no common state practice in the treatment of climate refugee throughout the world.<sup>123</sup>

To sum up, It is established fact that, the effects of climate change are felt all across the world but people in Horn of Africa are disproportionately suffer from the negative consequences of climate change. Given its geographical position, the continent has been particularly vulnerable due to the considerably limited adaptive capacity, exacerbated by widespread poverty and the existing low levels of development. As a result of this millions of people are subject to

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<sup>120</sup> Pacific Guardians, August 2014. The case: How New Zealand residence was granted through climate change?

<sup>121</sup> Ibid

<sup>122</sup> Sharpe M, supra note 92

<sup>123</sup> Ibid

displacement and lack of adequate protection. The limited nature of refugee definition under the international refugee, regional laws and state practice in relation to protection of climate refugees, do not adequately address climate change displacement. Climate change refugees typically do not suffer the type of persecution that qualifies for refugee status. In other words, the refugee status and claim for protection under the international refugee law is limited to those who have a well-founded fear of persecution for reasons of religion, race, nationality and membership of a particular social group, or political opinion. Alternative protection may be found under the norms of international human rights law is not inadequate. Furthermore states prefer the restrictive definition but they provide marginal protection for those climate-induced displaced person.



## 4 Filling the gap: searching for appropriate regime

*“A major question is whether there is an appetite to come up with new norms and protections my suspicion is that there is zero appetite” José Riera, UNHCR*

Now it is clear that, under the international legal and institutional framework the protection of cross border displacement of people is limited to people escaping from persecution across a national border against the convention reasons.<sup>124</sup> Several international legal scholars try to expand the scope of regional and international refugee law, however, currently, it is universally agreed that the international human right and refugee law regime is not able to accord any kind of protection to the refugees flee due to climate change. Therefore, this section critically analyzes the possible global solutions for climate change governance under the international law particularly the UNFCCC regime.

### 4.1 The United Nations framework convention on climate change (UNFCCC)

The United Nations Framework Convention on Climate Change - UNFCCC is an international environmental treaty. It was opened for signature on 1992 and entered into force 1994. The crucial objective of the convention is to stabilize greenhouse gas concentration in the atmosphere at the level that would prevent dangerous anthropological interference with climate change.<sup>125</sup> It also provides a framework for negotiating specific international treaties called protocol. Those protocols will be a binding instrument to the parties of the convention. As a result the Kyoto protocol was concluded as a binding instrument to establish a legally binding obligation for developed countries to reduce their greenhouse gas emission. The parties to the convention have met annually in the conference of the parties here in after referred as COP to address progress in dealing with climate change and its related issues.

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<sup>124</sup> Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

<sup>125</sup> See, article 2 of UNFCCC

At the international level, an important step was made in Cancun, Mexico in 2010. The Cancun agreement includes the most comprehensive package ever agreed by the governments to help developing countries to deal with the effects of climate change.<sup>126</sup> In effect, article 14 of the Cancun agreement invites states parties to enhance action on adaptation. In more detail manner article 14 (F) of the same agreement indicated that: Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned reallocation, where appropriate, at national, regional and international levels.<sup>127</sup> In other words, the objective of the agreement is intended to enhance action on adaptation, including through international cooperation. In due course enhanced action on adaptation is to assist the vulnerable people in the developing world to adopt the inevitable impacts of climate change by taking a coordinated approach to adaptation. Such coordinated approach to adaptation seeks to reduce vulnerability and build resilience in developing country parties, taking in to account the urgent and immediate needs of those developing countries that are particularly affected due to climate change. In addition, the Cancun adaptation framework request all parties to undertake a work program to consider approaches to address loss and damage associated with climate change in developing countries that are severely affected by the impacts of climate change.

#### **4.2 Adaptation and mitigation as a response to climate change refugees**

The terms “adaptation” and “mitigation” are two important terms that are fundamental in the climate change debate. The IPCC defined adaptation as adjustment in natural or human systems in response to actual or expected climatic change or their effects, which moderate harm or exploits beneficial opportunities. Article 4 (1) (f) of the UNFCCC provides that, state parties shall take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.<sup>128</sup>

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<sup>126</sup> UNFCCC: Cancun adaptation framework available at <http://unfccc.int/adaptation/items/6052.php>

<sup>127</sup> See, Cancun agreement article 14 <http://unfccc.int/adaptation/items/6052.php>

<sup>128</sup> See article 4 (1.a) of UNFCCC

Having the economic and technological advancement of developing countries in mind, it is clear national responses to climate change are not sufficient to mitigate the effects of climate change and adapt through national efforts alone. In other words, since the most vulnerable regions are the poorest they are under-equipped to support widespread adaptation plans. Therefore, receiving and welcoming climate refugees should be recognizing as an adaptation strategy. However, in order to take migration as adaptation strategy and response to the protection of climate refugee protection, radical change in perceptions of developing and developed countries is needed.<sup>129</sup> As discussed above the affected communities have seen displacement as losing once dignity, on the other hand developed countries perceived migration as a problem and sceptic to provide solution for it. Besides, the agreement recognizes that efforts to address displacement need to be undertaken not only at the national but also regional and international levels, thus putting climate-related cross-border displacement as well as internal displacement on the international agenda. Paragraph 14(f) does not, however, say how exactly climate change-induced displacement should be addressed.

Nevertheless, with the Cancún Outcome Agreement a consensus has been reached among states that can be built upon in other subsequent climate change negotiations.<sup>130</sup> As part of the Cancun adaptation framework the COP initiated, in 2010, consideration on approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change. Following two years of deliberations on this issue, COP19 (November 2013) established the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, as the main vehicle under the Convention to promote the implementation of approaches to address loss and damage in a comprehensive, integrated and coherent manner.

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<sup>129</sup> Nishimura, *supra* note, 108, P.129

<sup>130</sup> UNHCR (2012) Protecting people cross borders in context of climate change: Normative gaps and possible approaches P. 54

### 4.3 The Warsaw international mechanism for loss and damage

There is no commonly agreed definition of loss and damage; mostly it is understood broadly to refer the negative impacts of climate change. That is to say, the term loss and damage in the context of climate change refers to the impacts of climate related stressors that occur despite efforts to reduce greenhouse gas emissions and adapt to climate changes. Schäfer and Kraft defined the term loss and damage, as “damage can be describing harming climate change impacts affecting a person or entity possible to repair or rebuild.”<sup>131</sup> On the other hand, the term loss can be understood as harming climate change impacts not possible to repair or rebuild.<sup>132</sup>

The issue of loss and damage comes to picture, where climate change related loss and damage where effects of climate change have not been avoided through mitigation or adaptation. Such loss and damage included both slow and sudden onset effects of it. Both the UNFCCC and the Kyoto protocol do not address the issue of loss and damage in any of their provisions. The injuries and consequences of climate change have been under negotiation in the international climate process for many years.<sup>133</sup> Members of the UNFCCC committed themselves to mitigate the greenhouse emission and to adapt the climate changing. However existing mitigation commitments and actions will not prevent dangerous climate change related impacts.<sup>134</sup>

Due to the urgency to support peoples affected by climate change impacts, the mechanism will address losses and damages associated with long-term climate change impacts in developing countries that are especially vulnerable to such impacts. The mechanism will also facilitate the exchange of information and best practices for dealing with climate change-induced losses and damages, as well as strengthen action and support, including by facilitating the mobilization of

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<sup>131</sup> Schäfer L and Kraft S ( 2014), Loss and Damage: Roadmap to Relevance for the Warsaw International Mechanism P.5

<sup>132</sup> *ibid*

<sup>133</sup> Climate change policy and practice (2015), Loss and Damage: the Road to Paris and Beyond, policy #19

<sup>134</sup> as stated under the ultimate objective of UNFCCC, all parties to the climate treaties are committed to avoid dangerous anthropogenic interference to the climate. See also UNFCCC, Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts available at [http://unfccc.int/adaptation/workstreams/loss\\_and\\_damage/items/8134.php](http://unfccc.int/adaptation/workstreams/loss_and_damage/items/8134.php)

finance. In the meantime, the interim implementation of the mechanism will be guided by an executive committee, which will report to the COP, and be reviewed in 2016.<sup>135</sup>

This provision is important in several respects. For the first time, the international community recognizes explicitly the humanitarian consequences of climate change-related population movements as an adaptation challenge. Second, displacement is expected to become part of national adaptation plans foreseen by the Outcome Agreement, thus providing an entry point for protection and assistance issues. This opens up the prospect that the Green Climate Fund, set up to finance adaptation measures, may support activities in the field of displacement occurring in the context of climate change.

#### **4.4 A global problem that needs a global response**

While climate change affects everyone, it will hit the poorest and the most marginalized groups the hardest. Those who are already in a situation of vulnerability because of factors such as age, gender, and socio-economic status, will be disproportionately affected. This underlines the importance of effective human rights guarantees to reduce vulnerability in the face of climate change. In other words, climate change is a global phenomenon.<sup>136</sup> Its impact, yet, it vary based on geographical context and will most dramatically affect already vulnerable populations in developing countries.<sup>137</sup>

African countries are taking the lead in developing laws that regulate the refugee and internally displaced persons through binding legal instruments. Over the past years, there have been a number of proposed solutions to the issue of protection of climate change refugees. Most of those suggestions incorporate some form of an international agreement or framework.<sup>138</sup> As a result there have been calls for a proposal for new international instrument that governs the cross-border displacement developed following the Copenhagen Accord. All the proposals cite the scale of the climate change displacement problem as a justification for the development of new governing international law. However, those proposals refer solution

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<sup>135</sup> Ibid

<sup>136</sup> Nishimura L. *supra* note 108, P. 126

<sup>137</sup> Ibid

<sup>138</sup> Id P. 118

centered to the small island states,<sup>139</sup> the reason could be, migrants' rights may be easy to assert for islanders whose homes are destroyed but hard in the case of big, messy movements across Africa.<sup>140</sup> Most of the displaced migrate to the next poor country in the region. Similarly, in 2009, NGOs unsuccessfully suggested inserting a framework for international resettlement programs in the Copenhagen treaty.<sup>141</sup> It is evident that the accumulation of greenhouse gases emissions by developing country is small. In contrast, the wealth-industrialized countries have caused most past and present greenhouse gas emissions. Thus they should do their share in receiving, financing and facilitating the protection and resettlement of climate refugees. That is to say, the industrialized countries bear most of the moral responsibility for the victims of climate change.<sup>142</sup>

As it is noted, displacement in Africa is complex. People are displaced for different reasons some because of conflict, some because of disasters and some are evicted for urban renewal projects while still others are displaced because of large-scale development projects.<sup>143</sup> In comparison with refugees, IDPs have received much less international attention even though their numbers are far higher than refugees. Resolving displacement can contribute to peace processes and at the same time often depends on the resolution of conflict. Addressing cross border displacement requires political commitment by governments and often support from the international community and the record on both is mixed.

Above and beyond, the large displacement of climate refugee Africa to neighboring countries places a strain on their resources and the region already suffering from resource based conflict among the pastoralist communities. It is also true some extremists will also cross the border to

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<sup>139</sup> See Hodgkinson. D, Burton T and et.al (2009), Copenhagen, Climate Change” Refugee” and the need or global agreement; see also the hour when the ship comes in: A convention for persons displaced by climate change.

<sup>140</sup> The Economist, June 25, 2009, *Migration and Climate Change: A New (Under) Class of Travellers*.

<sup>141</sup> Mayer, supra note, 110

<sup>142</sup> Eventough industrialized countries are responsible for the largest production of CO2 emissions and bind to bear the greatest burden of emission reduction and financing , Still China and India who are under the group of developing countries are now leading countries in producing of CO2 emissions worldwide in 2014.

<http://www.statista.com/statistics/271748/the-largest-emitters-of-co2-in-the-world/>

<sup>143</sup> Nishimura, supra note 108, P. 126

neighboring countries refugee camps and use the host country to regroup or punish them. Already this is happening in some parts of Africa, and leading to a spillover a conflict.<sup>144</sup>

#### **4.5 Common but differentiated responsibilities and respective capabilities**

The concept of Common but Differentiated Responsibilities (CBDR) was enshrined as Principle 7 of the Rio Declaration at the first Rio Earth Summit in 1992. The declaration provides that: *“In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”*<sup>145</sup>

Common but Differentiated Responsibilities and Respective Capabilities (CBDR–RC) is a principle within the United Nations Framework Convention on Climate Change (UNFCCC) that acknowledges the different capabilities and differing responsibilities of individual countries in addressing climate change. This principle stated under article 4(1,e) of the UNFCCC as; *the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*<sup>146</sup>

The existence of this principle under the convention makes clear that a global agreement and commitment to address effects of climate change must necessary apportion responsibility and burden sharing between diverse parties. More practically, as the impacts of climate change become increasingly apparent and the effects more painfully felt, the common but differentiated responsibilities likely to remain the international focal point for humankind’s response to climate change for the foreseeable future. Likewise, Brunnee argued that the

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<sup>144</sup> Eg. The study by the Norwegian Refugee Council on migrants/ refugees who flee from climate change and ethnic based persecution from the Horn of Africa to Yemen are currently under treat due to the civil war and other terrorist activities in Yemen. Current news also confirms that currently refugees are beheaded by ISIS (Islamic State) in Libya, regardless of their cause of flight.

<sup>145</sup> See, principle 7 of the Rio declaration

<sup>146</sup> See, article 4 of the UNFCCC

concept of common but differentiated responsibilities is the other side of the common concern coin; all states have responsibilities to cooperate to address climate change, the specific responsibilities of individual states will differ depending on the capacity and contribution of the problem.<sup>147</sup>

This thesis argues that the international community bears certain obligations toward populations affected by climate change, including setting up international relocation programs for climate refugees. Thus the responsibility of the international community's responsibility is first justified under the obligation of states parties under the UNFCCC. Article 4 of the UNFCCC provides that the developed country Parties shall assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.

For developing countries, such as Africa the principle of common but differentiated responsibilities could become a major negotiation goal in order to share the burden of protection of those displaced persons. Reflecting a widespread claim in the developing world, the Ethiopian late Prime Minister Meles Zenawi who speaks for Africa at several global gatherings stated, "Those who did the damage will have to pay."<sup>148</sup> The idea of late prime minister Meles has been and still shared by the African leaders in their climate negotiations. However, Voigt argued in her article on state responsibility for climate change, as the international law in general and international environmental treaties are "ill equipped" in a situations such as compensation for climate change damages.<sup>149</sup>

The UNFCCC should make a strong reference to human rights as the guiding principles to address the negative effects of climate change. This would partly shift the focus of adaptation policies from states to individuals who are threatened by climate change in a way that might become existential. The rights-based approach establishes procedural standards for government policies. It also supports vulnerable groups and individuals in holding their government accountable to fulfill their respective obligations towards the people who have

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<sup>147</sup> Brunnee J. (2012) the global Climate Regime: wither common concern? P. 25

<sup>148</sup> The Economist, supra note, 138

<sup>149</sup> Voigt C. ( 2008), State Responsibility for Climate Change Damages, P. 2



individual rights to adequate housing, food, water, health, etc. In conclusion, rights-based adaptation policies are one good tool to ensure that money earmarked for adaptation is spent reasonably.

#### **4.6 Paris “last chance” to take action: hope for climate refugees**

Beyond the debate on climate change’s role in the current crisis in East Africa, one thing is clear. If nothing is done, climate change will in future make a bad situation worse; again beyond short-term humanitarian response, cross border displaced persons will need a durable solution and formal protection. Despite, some attempts to address the effects of climate change, the significant impediments to a protection regime are the lack of political will of developed countries. This lack of will undermines the hope and possible solutions to fill the gap of protection. Nishimura argued that the protection of climate change refugees in anyway shouldn’t be attached to issue of direct importance to developed states in terms of state’s self-interest.<sup>150</sup> Otherwise the current political impasse will continue without providing adequate response to the climate change and displacement.<sup>151</sup>

Fortunately, several opportunities are at hand to set the broad group of stakeholders onto the right paths. For instance, the anticipated agreements on climate change mitigation and adaptation at the UNFCCC’s Conference of the Parties in Paris; the new Sustainable Development Goals and the World Humanitarian Summit. Displacement is one bridge across all of these policy forums – it is the human face of them. Coordinated efforts, coherent standards, objectives and indicators among these global processes will provide the necessary momentum to reduce the human impacts that governments are striving to avoid.

Though it is argue that, a better solution appears to lie with a new international legal instrument tailored for the need of climate refugees under the UNFCCC. The efforts to address the protections and needs of climate refuges must draw from human right standards. Moreover, the role of UNHCR should be acknowledged in coordinating the advisory group on climate change and Human Mobility.<sup>152</sup> In addition, For instance, Refugee, environmental

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<sup>150</sup> Nishimura, supra note, 108 P. 132

<sup>151</sup> Ibid

<sup>152</sup> UN News Feature: Should international refugee law accommodate climate change? P.3

human rights, and international humanitarian law all provide relevant principles and models, and science and economics play a role as well.<sup>153</sup> Such agreement could build on the political support from all countries as parts to the climate change convention. It will target to support governments, local communities; national agencies in order to stop further displacement. That is to say, it is not only intended to support and protect only the climate refugees but such framework will also minimize further displacement of people.

In order to achieve protection of climate change induced displacement; there should be a dynamic shift of negotiation. That is to say, protection efforts should acknowledge the various needs of climate change refugees will differ based on their adaptive capacity and their country context.<sup>154</sup> Thus the solution of proposed for persons displaced from Small Island states may not fit for persons displaced from the horn of Africa. Thus the responses should be multi-dimensional, incorporate regional and local approaches.

Moreover, there is a widespread belief that more than 20 years of international climate negotiations have been a waste of time.<sup>155</sup> The negotiations have been centered on debating about the effects of climate change and its complex nature with migration. Indeed there is now awareness and experiencing the negative consequences by the international community particularly by the developing countries. The risks of climate change are real and visible at a time. No longer does one have to undertake much research to put forward evidence of an unstable, warmer climate. It is continuous. Last year was the world's hottest on record, many are displaced and countries are unable to tackle drought and shortage of water. Furthermore, no single event can be directly attributed to human-induced climate change, but their occurrence and severity are utterly consistent with a stream of climate models and predictions going back to the 1980s.<sup>156</sup> The current events in parts of Africa and the increase mass and it's interconnected with security and terrorism should be seen in light of addressing the need of answering and protecting climate change induced refugees. In this context the United Nations

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<sup>153</sup> Docherty B. and Giannini T. (2009) confronting a rising Tide: a proposal for a Convention on Climate Change refugees. P.373

<sup>154</sup> Nishimura, *supra* note, 108 P. 132

<sup>155</sup> Rowley N. (2015) why the Paris Climate talk won't be another Copenhagen available at <http://theconversation.com/why-the-paris-climate-talks-wont-be-another-copenhagen-39591> last accessed April 4/22/2015

<sup>156</sup> Ibid

Framework Convention on Climate Change meeting in Paris at the end of the year represents a potentially significant moment when real progress can be made.

#### **4.7 Implementation: collective approach**

No international institution is under mandate to protect those cross-border displaced persons that falls outside the scope of refugee law conventions.<sup>157</sup> Nishimura argues that a new international agreement or protocol to an existing agreement would require either a new agency or institution dedicated to the issue of climate change refugees, or expansions of current organization to facilitate their protection.<sup>158</sup> Perhaps, the later suggestion seems to refer to UNHCR or IOM, similarly, Biermann and Boas argues that a climate refugee protocol should not create new international bureaucracies; the resettlement of millions of climate refugees over the course of the century should be the task of existing agencies.<sup>159</sup> However, UNHCR stressed that, as it cannot manage today's mixed refugee flow.

However, the suggestions would not make clear the issues related to the institutional arrangement in relation to protection of cross border displacement due to climate change. This is because they refer to unspecified UN agencies. Therefore, the focus should be given to specifically which UN agency should be responsible to implement the new protocol?

To achieve protection of climate refugees, the issue of protection, as already discussed earlier, it must be began address under the UNFCCC framework more specific under the forthcoming Paris climate negotiation. Having this suggestion in mind, the implementation of the new protection protocol should not be attached to a single UN agency rather it should be mandated to the Inter-Agency Standing Committee (IASC). The justification for mandating this committee lies on the bases of its foundational architecture.

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<sup>157</sup>Nishimura, *supra* note, 108 P. 122

<sup>158</sup> *Ibid*

<sup>159</sup>Biermann F. and Boas I. (2008), *Protecting Climate Refugees: The Case for a Global Protocol* P. 5

The Inter-Agency Standing Committee (IASC) is a unique inter-agency forum for humanitarian coordination and for its members a policy development and decision making forum involving key UN and non-UN humanitarian actors.<sup>160</sup> The IASC was established in June 1992 in response to UN General Assembly Resolution 46/182 on the strengthening of humanitarian assistance. The members of the IASC are the heads or their designated representatives of the UN operational agencies (UNDP, UNICEF, UNHCR, WFP, FAO, WHO, UN-HABITAT, OCHA). In addition, there is a standing invitation to IOM, ICRC 1, IFRC 1, OHCHR, UNFPA, the Special Rapporteur on the Human Rights of IDPs and the World Bank. Again as it noted in part three of this thesis, currently the UN agencies such as UNHCR, OCHA and IOM extends their assistance to those cross border displaced persons on the base of marginal protection.<sup>161</sup> Since IASC is the combination of this and other potential UN agencies it would make the implementation easier than attaching the mandate to a single UN agency.

To be clear, a multitude of international organizations offer protection to climate displaced persons and help them with aid for reintegration and development. First under the IASC committee the various UN agencies, ranging from UNHCR to UNICEF to OCHA are represented by this committee. Others in the field are the ICRC, the International Organization for Migration and many NGOs. Second, mandating IASC will solve the lack of political will to create a new agency to address the needs of the internally displaced. Such a new entity, it was feared, would duplicate the work of other agencies and almost certainly meet with opposition from governments that object to international involvement with their displaced populations. In addition, it will avoid from making of the entire duty on UNHCR alone to assume the responsibility. So the “lead agency” should replace by the collective approach and principles of IASC that will adequately address the proper implementation of the theoretical treaty/protocol.

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<sup>160</sup> Inter-Agency Standing Committee, available at <http://www.humanitarianinfo.org/iasc/>

<sup>161</sup> Supra note, 67

Finally, it is necessary to keep in mind that there is a growing effect of climate change throughout the world, which will require much more attention and policy consideration from the international community than before. It is too simple to assume and argue that as climate change cannot cause displacement or might be more of internal movement of people within their national border. Whether it is internal or cross-border; the international community should come up with new binding agreement under the UNFCCC regime. The next issue would be which institution should take the lead for implementation of the new international treaty/ protocol, nevertheless, UNHCR has no mandate to protect to people displaced across international borders due to climate change either sudden or onset natural and manmade disasters. Even though UNHCR's extending marginal protection to internally displaced persons and others 'threatened with displacement' states have not given the office a legal mandate equivalent to the 1951 Refugee Convention to protect them. This lack of appetite from the international community created a doubt on which institution could strongly operationalize the issue of right protection of internationally or cross border displaced persons. As a result some researchers advocate for the creation of new institution, while others add the assignment to the existing UN agencies such as UNHCR and IOM. Theoretically, governments could agree on new treaty or protocol. Since the protection of climate change refugee is complex, in order to get effect implementation of any propose protocol for climate change refugees, a coordinated and combination of existing UN agencies would not be inevitable. In other words, even though the agreement is going to be fall under the UNFCCC regime, however the implementation should not be linked to a specific institutional mandate. Therefore, this thesis suggests that, the existing UN committee-AISC could effectively implement the treaty/protocol on the protection of climate refugees.

## **5 Conclusions**

Climate change has been the causes of human displacement and threatens the global security. The serious impacts of climate change disproportionately felt by the African countries and reports indicated that there are mass displacements of people due to climate change. Though climate change significantly affects the livelihood of individuals, the existing international legal framework has been felt as inadequate. As a result the governance of climate refugees is a major challenge for the international community. The core issue under the existing refugee instruments is that it would be difficult to establish the person displaced by climate change has been persecuted as required by the definitions existing in refugee laws. It is clear that, in any event, a causal link between the specific emissions of a state and climate change events that result in displacement is difficult to establish. Despite the reality of climate change, the issue of climate change victims has been politically categorized to the internally displaced persons, this has been use of avoiding the obligation of countries particularly states parties under the climate change convention.

Apart from the inapplicability of the international refugee law instruments, lack of political will of states showed in different COPs by making the issue of displacement as the only concern of developing countries that are disproportionality felt by its effect. Therefore this thesis strongly suggests that there is no need to wait for the extreme and violent effects of climate change than already experienced by those vulnerable people. In general, the impact of drought and desertification in Africa is particularly harsh. Climate refugees and environmental displaced persons they represent an independent category of refugee that requires specific and autonomous recognition by the international legal system. Current climate change negotiations indicated that, state parties to the UNFCCC have shown some interest to address the protection issue of climate refugees.

It is established fact that the UNFCCC has a legal limitation for dealing with climate refugees, the primarily concerns state to state relations; it doesn't discuss duties that states have to do with individuals or communities, such as those laid down in human rights and refugee laws as

well. In addition, the UNFCCC doesn't contemplate or address the issue of climate change displacement but it is the appropriate legal framework to deal with this issue in the form of protocol.

Indeed, all effects of climate change cannot be mitigated and adapted rather its consequences and burden should be accepted by all countries in general and industrialized countries in particular. Overall, developing countries have been contributing less emission but impact distributed and continues to be distributed very unevenly and disproportionately. Therefore developed countries should take the lead in combating and addressing issues related to climate change crisis particularly climate induced displacement.

As discussed in the entire text of this thesis, the issue of protection of cross displaced persons has been the question of political agreement rather than extending basic and fundamental human rights. Again it is clear that the 1951 and related convention have a limited space on dealing the issue of climate refugees Therefore, responsible global governance is needed. Recent climate negotiations provided a critical opportunity for global community to come together towards providing a protection to cross border displacement. Fortunately, the international communities have a lot of opportunity to come up with international legal framework, for instance the forthcoming Paris climate conference. Hopefully the largest carbon emitters will accept accountability and agree to decisive action in the area of migrations, adaptation and loss and damage. Hence, the thesis argued for the creation of a new legal frame work together and as part of the UNFCCC will be one step to create an international organization which will have a permanent mandate over the protection of cross border displacement.

In addition, if the climate challenge is to be met effectively, and the resulting global agreement is to be supported by the 196 potential country signatories, it must be seen as fair for all without undermining the need of developing countries. This means the agreement must recognize both the different contributions of countries to climate change displacement and the changing nature of the global economy. It must acknowledge where nations have more responsibility and where they have more capacity to tackle climate change by acknowledging the regional and local a capacity of member states.

To sum up, as noted above, for more than a couple of decades international climate negotiations have been made among states parties to the UNFCCC. However, the negotiations have been centered on debating about the effects of climate change and its complex nature with migration. Indeed there is now awareness and experiencing the negative consequences by the international community particularly by the developing countries. The risks of climate change are real and visible at a time. No longer does one have to undertake much research to put forward evidence of a unstable, warmer climate. . That is to say, the current events in parts of Africa and the increase mass displacement and it's interconnection with insecurity and terrorism should be seen in light of addressing the need of answering and protecting climate change induced refugees. In this context the United Nations Framework Convention on Climate Change conference in Paris at the end of this year represents a potentially significant moment when real progress can be made.



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