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## A PENCHANT FOR PROTECTION: CLIMATE CHANGE REFUGEES UNDER THE 1951 REFUGEE CONVENTION

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### ABSTRACT

Cross-border displacement due to the impacts of climate change is an emerging reality that will aggravate in the years to come. People who cross borders due to the impacts of climate change, which are of a permanent nature in their home State, have so far been unsuccessful in qualifying for protection under the 1951 *Refugee Convention*. This paper examines how climate change refugees who have a 'well-founded fear of being persecuted' for reasons of 'membership of a particular social group' should be considered refugees under the *Refugee Convention*. The paper advances the argument that a human rights-based approach together with an evolutionary interpretation necessitates the inclusion of such refugees under the Convention. An analysis of Ioane Teitiota's predicament, in leaving the disappearing State of Kiribati and being denied refugee status in New Zealand, demonstrates that a human rights-based approach together with an evolutionary interpretation could have offered him protection under the *Refugee Convention*. The paper also considers the major arguments put forward against the inclusion of climate change refugees under the *Refugee Convention* and concludes that their inclusion within the ambit of the Convention is in keeping with its humanitarian spirit.

### 1. INTRODUCTION

Displacement induced by climate change is a current reality that will be aggravated in the years to come. International law does not explicitly provide climate change refugees with mechanisms to secure resettlement rights or financial assistance, thus leaving a gap in protection for those leaving their countries due to unbearable conditions.<sup>1</sup> It is estimated that

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<sup>1</sup> Xing-Yin Ni, 'A Nation Going under: Legal Protection for Climate Change Refugees' (2015) 38 *Boston College International and Comparative Law Review* 329, 330.

by 2050, around 150 million people or more could be displaced owing to impacts of climate change as a result of extreme weather, slow-onset events.<sup>2</sup> These include rising sea-levels and desertification, and conflicts over scarce resources.<sup>3</sup> Further, certain states such as Kiribati, Tuvalu and Maldives are at the risk of being completely uninhabitable due to the impacts of climate change, such as continued sea level rise, storm surges and a lack of resources to adapt to effects of climate change.<sup>4</sup> The Council of Europe in a resolution adopted in 2019 recognised the necessity to develop ‘protection for people fleeing long-term climate change in their native country’.<sup>5</sup> It has also encouraged the liberal application of the definition of ‘refugee’ under the 1951 Convention relating to the Status of Refugees (‘Refugee Convention’) and its Protocol.<sup>6</sup> However, the term ‘climate refugees’ is considered a misnomer and ‘scholarly suicide in the world of international refugee law’.<sup>7</sup>

The next part asserts that a climate change refugee is a person who has crossed borders involuntarily due to the impacts of climate change which are of a permanent nature, in their home State. It explores the available protection under the existing legal framework and argues that in the absence of a legally binding international instrument dealing with cross-border climate change displacement, interpretation of the Refugee Convention offering protection would protect key rights. Part 2 further explores case law dealing with refugee claims of those displaced by climate change. Though no case has positively determined that a climate change refugee could fall within the ambit of the Refugee Convention, the

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<sup>2</sup> United Nations Human Rights Special Procedures, *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment* UN doc A/74/161 (01 October 2019) 11.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid*; Xing-Yin Ni (n 1) 332.

<sup>5</sup> Parliamentary Assembly, *A Legal Status for “Climate Refugees”* Resolution 2307 (2019) adopted by the Assembly on 3 October 2019 (34<sup>th</sup> sitting) <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=28239&lang=en>> accessed 10 April 2020, para 5.4.

<sup>6</sup> Parliamentary Assembly, *Situation of de facto refugees* Council Recommendation 773 (1976) <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=14807>> accessed 10 April 2020.

<sup>7</sup> Lauren Nishimura, ‘Climate change and international refugee law: A predicament approach’ (*RefLaw*, 19 October 2018) <<http://www.reflaw.org/climate-change-and-international-refugee-law/>> accessed 20 April 2020.

New Zealand case determination on Ioane Teitiota's refugee claim is promising. The case implied that environmental degradation resulting from climate change could fall under the Refugee Convention.

Part 3 argues that as the Refugee Convention is a living instrument, its provisions should be interpreted taking into account the current social and legal context. Since the Refugee Convention is of continuing duration and because the terms such as 'being persecuted' and 'particular social group' are generic, there is a presumption that the drafters intended the terms to evolve. Thus, an evolutionary interpretation in keeping with the humanitarian objective of the Convention enables climate change refugees to be considered under the Convention.

Part 4 contends that the human rights and anti-discriminatory objectives of the Refugee Convention enable the adoption of a human rights-based approach in determining both 'being persecuted' and 'a particular social group'. Impacts of climate change violate the right to life and other associated rights such as the right to livelihood, an adequate standard of living, food, housing, health, etc., constituting persecution on cumulative grounds. Further, it will be argued that climate change refugees constitute a particular social group because of their common attempt to exercise the right to a healthy environment.

Part 5 analyses the predicament of Ioane Teitiota in the light of the human rights-based approach in determining 'being persecuted' and 'membership of a particular social group.' It argues that Teitiota's predicament constitutes persecution on cumulative grounds and that he cannot reasonably be expected to tolerate such violations. The section further argues that Teitiota is a member of a 'particular social group' defined by the common attempt of its members to exercise the right to a healthy environment.

Part 6 considers some major arguments against the inclusion of climate change refugees under the Refugee Convention and seeks to counter them, buttressing that the Refugee Convention is capable of encompassing climate change refugees.

## 2. THE PREDICAMENT OF CLIMATE CHANGE REFUGEES

### 2.1 Who are “Climate Change Refugees”?

For the purpose of this paper, climate change refugees are those who have crossed borders involuntarily due to the impacts of climate change which are of a permanent nature in their home State. Under Article 1(A) (2) of the Refugee Convention, the term ‘refugee’ includes any person who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’.<sup>8</sup> This definition does not explicitly include those who seek refuge in other countries owing to impacts of climate change. However, courts globally have held instances, such as gender-based persecution and persecution based on one’s sexual orientation, which are not explicitly mentioned in Article 1(A) (2), as falling within the ambit of the Refugee Convention.<sup>9</sup> Such cases demonstrate that courts have adopted an evolutionary interpretation and a human rights-based approach in applying the Convention to emerging issues pertaining to refugee claims.

The UNHCR has recognised environmental degradation as one of the causes leading to large-scale involuntary population displacement and notes the complexity of the present refugee problem with the potential risk of new refugee situations emerging.<sup>10</sup> It further recognises that the causes of such large-scale involuntary population movements are complex and interrelated and encompass gross violations of human rights.<sup>11</sup> Further, the Human Rights Committee has recognised that sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea level rise, salinisation, and land degradation) could propel the cross-border

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<sup>8</sup> *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Art 1(A) (2).

<sup>9</sup> See *In re Fauziya Kasinga* [1996] Interim decision #3278, 357 (United States Board of Immigration Appeals); *HJ v Secretary of State* and *HT v Secretary of State* [2010] UKSC 31.

<sup>10</sup> UNHCR, *A Thematic Compilation of Executive Committee Conclusions* (7<sup>th</sup> edn, UNHCR 2014) 213.

<sup>11</sup> UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975-2017 (Conclusion No.1-114)* (October 2017) 179.

movement of individuals seeking protection from climate change-related harm.<sup>12</sup>

## *2.2 Existing Framework to Protect Climate Change Refugees*

The existing legal framework in relation to climate change focuses on mitigation and adaptation to climate change impacts and is inadequate to protect climate change refugees.<sup>13</sup> Thus, climate change refugees have no right to remain permanently in another country and they face an uncertain future. The Cancun Adaptation Framework was the first instrument by the United Nations Framework Convention on Climate Change (UNFCCC) to explicitly recognise climate migration.<sup>14</sup> The Nansen Principles developed at the Nansen Conference on Climate Change and Displacement in Principle IX recognise the lacuna in protection for ‘people displaced externally owing to sudden-onset disasters.’ The Nansen Initiative launched in 2012 focused on the slow-onset impacts of climate change which led to forced displacement.<sup>15</sup>

There is no binding international agreement on the rights of persons displaced by climate change or the State obligations towards these people.<sup>16</sup> The Refugee Convention confers a range of rights such as the freedom of religion,<sup>17</sup> property rights,<sup>18</sup> access to courts,<sup>19</sup> employment

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<sup>12</sup> *Ioane Teitiota v New Zealand* (Advance unedited version) UN Human Rights Committee CCPR/C/127/D/2728/206, para 9.11.

<sup>13</sup> United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC); Xing-Yin Ni (n 01) 347.

<sup>14</sup> Para 14(f) invites all parties to enhance action on adaptation through measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.

<sup>15</sup> Xing-Yin Ni (n 01) 347.

<sup>16</sup> UN Environment, ‘The Status of Climate Change Litigation: A Global Review’ (May 2017) 32.

<sup>17</sup> Refugee Convention, Art 4.

<sup>18</sup> *Ibid* Art 13 and Art 14.

<sup>19</sup> *Ibid* Art 16.

rights,<sup>20</sup> housing,<sup>21</sup> education rights,<sup>22</sup> freedom of movement,<sup>23</sup> the guarantee of non-refoulement,<sup>24</sup> etc. Therefore, the inclusion of climate change refugees under the Refugee Convention would guarantee them a range of integral rights.

Several regional and multilateral treaties have expanded the definition of a 'refugee' beyond that provided for in the Refugee Convention, providing possible protection to those fleeing impacts of climate change. For instance, the 1969 OAU Refugee Convention and the Bangkok Principles include those who are compelled to leave their habitual residence due to 'events seriously disturbing public order.'<sup>25</sup> The 1984 Cartagena Declaration on Refugees in Latin America considers those who have 'fled their country because their lives, safety or freedom have been threatened by...massive violation of human rights or other circumstances which have seriously disturbed public order' as refugees.<sup>26</sup> The Rio de Janeiro Declaration on the Institution of Refuge extends protection to 'victims of serious and generalized violation of human rights'.<sup>27</sup> Though these declarations are endorsed and followed by a number of states, they are not legally binding documents. However, the fact that the regional conventions and declarations introduced after the Refugee Convention have expanded the definition of a refugee, implies that those instruments have recognised the necessity for an evolving definition of a refugee.

### 2.3 Climate Change Refugees as 'Refugees' under the Refugee Convention

The hesitance to include climate change refugees under the Refugee Convention stems from the perception that refugees are a burden rather

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<sup>20</sup> *Ibid* Art 17 to 19.

<sup>21</sup> *Ibid* Art 21.

<sup>22</sup> *Ibid* Art 22.

<sup>23</sup> *Ibid* Art 26.

<sup>24</sup> *Ibid* Art 33.

<sup>25</sup> *Convention Governing the Specific Aspects of Refugee Problems in Africa* (entered into force 10 September 1969) 1001 UNTS 45 (OAU Convention) Art 1(2); Asian-African Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees* (Bangkok Principles) Art 1(2) and Art 1(2).

<sup>26</sup> Cartagena Declaration on Refugees 1984,s III (3).

<sup>27</sup> Rio de Janeiro Declaration on the Institution of Refuge (10 November 2000).

than individuals who are at risk.<sup>28</sup> In *Canada (Attorney General) v Ward* the Supreme Court of Canada stated that the rationale upon which international refugee law rested was not merely the need to give shelter to those persecuted by the State, but also to provide protection for those whose home State cannot or does not afford them protection from persecution.<sup>29</sup>

Courts tend to dismiss refugee claims by climate change refugees on the ground that their predicament does not meet the requirements under the Convention definition. In *AC (Tuvalu)*, the Immigration and Protection Tribunal of New Zealand held that the appellants who were fleeing from climate change impacts in Tuvalu such as coastal erosion, flooding and inundation, water stress, destruction to primary sources for subsistence, and damage to individual and community assets, were not refugees within the meaning of the Refugee Convention.<sup>30</sup> This was because ‘whatever the harm they faced in Tuvalu due to the anticipated adverse effects of climate change, it did not arise by reason of their race, religion, nationality, membership of any particular social group or political opinion’.<sup>31</sup> In *Ward*, the court held that ‘victims of natural disasters, even when the home state is unable to provide assistance’ do not qualify for protection because of the need for “persecution”.<sup>32</sup>

Though there is no single case where a climate change refugee was positively determined as being within the ambit of the Refugee Convention, case law indicates the possibility of their inclusion. In *Ioane Teitiota v New Zealand*, the Human Rights Committee pointed out that the New Zealand Immigration and Protection Tribunal did not exclude the possibility that environmental degradation resulting from climate change or other natural disasters could create pathway into the Refugee

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<sup>28</sup> Gillian McFadyen, ‘The Contemporary Refugee: Persecution, Semantics and Universality’ in *eSharp Special Issue: The 1951 UN Refugee Convention - 60 Years On* [2012] 9, 10.

<sup>29</sup> *Canada (A G) v Ward* [1993] 2 SCR 689, 709 (SC).

<sup>30</sup> *AC (Tuvalu)* [2014] NZIPT 800517-520.

<sup>31</sup> *Ibid* para 45.

<sup>32</sup> *Ward* (n 29) 689; See *Applicant A v Minister of Immigration and Multiethnic Affairs* [1998] INLR 1, 19 and *AH (Sudan) v Secretary of State* [2007] 3 WLR 832, 844.



Convention.<sup>33</sup> Though the Tribunal found Teitiota's claims to be credible, it ruled against him because there was 'no evidence establishing that the environmental conditions that he faced or is likely to face on return are so parlous that his life will be placed in jeopardy, or that he and his family will not be able to resume their prior subsistence life with dignity.'<sup>34</sup> The Tribunal stated that "while in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist".<sup>35</sup> This implies that where a person's life is in jeopardy or where he cannot resume life with dignity, a claim for refugee status may be found based on the circumstances of the case.

This paper seeks to advance the argument that climate change refugees face persecution under the 'membership in a particular social group' category. An evolutionary interpretation and a human rights-based approach to 'being persecuted' and 'particular social group' enable such a construction.

### 3. INTERPRETATION OF THE REFUGEE CONVENTION VIS-À-VIS AN EVOLUTIONARY INTERPRETATION

The definition of who constitutes a refugee should be interpreted taking into account emerging realities. The Declaration of States Parties to the 1951 Convention issued at the December 2001 Ministerial Meeting (which was accepted by all States Parties as being in connection with the treaty) recognised that the Refugee Convention is of 'enduring importance'. The Declaration specifically recognised that the environment in which refugee protection is being provided is 'evolving' (though it did not explicitly refer to climate change refugees). It further reiterated Article 14 of the *Universal Declaration of Human Rights* (UDHR) which states that everyone has 'the right to seek and to enjoy in other countries asylum from persecution'.<sup>36</sup>

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<sup>33</sup> *Ioane Teitiota* (n 12) para 2.2; *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107, para 13.

<sup>34</sup> *AF (Kiribati)* [2013] NZIPT 800413, para 74.

<sup>35</sup> *Ibid* para 64.

<sup>36</sup> *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA res 217A(III) (UDHR) Art 14.

According to Hathaway, an interpretation made in the light of the treaty's object and purpose should take account of the historical intentions of the drafters, and 'temper that analysis to ensure the treaty's effectiveness within its modern social and legal setting'. Judge Lauterpacht stated that the 'true intentions of the parties' may be 'frustrated if exclusive importance is attached to the meaning of words divorced from the social and legal changes which have intervened in the long period following upon conclusion of those treaties'.<sup>37</sup>

As treaties are 'living instruments' the historical intent should be balanced against contemporary evidence of the social and legal context.<sup>38</sup> In *Sepet and Bulbul v. Secretary of State for the Home Department*, Lord Bingham stated that the Refugee Convention should be seen as a 'living instrument in the sense that while its meaning does not change over time its application will'.<sup>39</sup> In *Ex p Shah*, Sedley J pointed out that unless the Refugee Convention was seen as a 'living thing, adopted by civilized countries for humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism'.<sup>40</sup> In *Ex p Adan*, Laws LJ observed that the signatory States intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world.<sup>41</sup> According to Lord Lloyd who advocated for a broad approach in interpreting the Convention, a 'true construction' of Article 1(A)(2) could be discerned by interpreting it in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language.<sup>42</sup>

For instance, though courts had previously disagreed on whether 'sexual disposition' could constitute a particular social group, claims based on

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<sup>37</sup> Lauterpacht, *Collected Papers* 133 as cited in Hathaway, J.C., *The Rights of Refugees under International Law* (first published 2005, Cambridge University Press) 62.

<sup>38</sup> Hathaway, *Ibid.*

<sup>39</sup> *Sepet and Bulbul v. Secretary of State for the Home Department* [2003] UKHL 15, para 6 per Lord Bingham.

<sup>40</sup> *R v Immigration Appeal Tribunal, Ex p Shah* [1997] Imm AR 145, 152.

<sup>41</sup> *Ex p Adan* [2001] 2 AC 477, 500.

<sup>42</sup> *R v Secretary of State for the Home Department, Ex p Adan* [1999] 1 AC 293 (HL).

sexual orientation are now increasingly accepted.<sup>43</sup> In *HJ v Secretary of State* and *HT v Secretary of State*, Lord Hope pointed out that persecution for reasons of homosexuality was not perceived as a problem by the High Contracting Parties when the Convention was drafted.<sup>44</sup> He went on to state that denying the existence of their sexual orientation or suppressing it, is to ‘deny the members of this group their fundamental right to be what they are- of the right to do simple, everyday things with others of the same orientation such as living or spending time together or expressing their affection for each other in public’.<sup>45</sup> He pointed out that though there was no mention of sexual orientation in the UDHR or in Article 1A(2) of the Convention, there has been an increasing recognition of the rights of gay people and the fundamental importance of not discriminating them based on their core identity as homosexuals.<sup>46</sup> Thus, it was pointed out that they are entitled to ‘freedom of association’ with others of the same sexual orientation, and to ‘freedom of self-expression’ in relation to their sexuality. This reflects how an evolutionary interpretation and a human rights-based approach have been adopted in extending refugee protection to a persecutory group that is not explicitly mentioned in the Refugee Convention. Thus, terms in a treaty such as ‘persecution’ and ‘social group’ should be interpreted taking into account the current social and legal context.

‘Persecution’ and ‘membership in a particular social group’ should thus be given an ‘evolutive’ meaning as part of adopting the teleological approach. Article 31.3(c) of the *Vienna Convention on the Law of Treaties* (VCLT) states that ‘any relevant rules of international law applicable in relations between the parties should be taken into account’.<sup>47</sup> An evolutionary interpretation is one such rule that should be considered.<sup>48</sup> Such an

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<sup>43</sup> Schoenholtz, ‘The New refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century’ [2015] 16(1) *Chicago Journal of International Law* 81, 115 & 116.

<sup>44</sup> *HJ v Secretary of State* and *HT v Secretary of State* [2010] UKSC 31, para 2.

<sup>45</sup> *Ibid* para 11.

<sup>46</sup> *Ibid* para 14.

<sup>47</sup> *Vienna Convention on the Law of Treaties* (entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

<sup>48</sup> See Chang-fa Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification* (Springer Nature Singapore Pte Ltd 2017) 256 and 258.

interpretation seeks to interpret a treaty term by attaching an ‘evolutive meaning’ to it based on the current understanding of the term.<sup>49</sup> It ensures that the application of the treaty would be effective in terms of its object and purpose.<sup>50</sup>

Such an evolutionary interpretation should be consistent with the intentions and expectations of the parties as they may have expressed during the negotiations preceding the conclusion of the treaty.<sup>51</sup> In *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the International Court of Justice determined that the words ‘the strenuous conditions of the modern world’, ‘the well-being and development’ of the peoples concerned, and ‘sacred trust’ in Article 22 of the Covenant of the League of Nations were not static and were by definition ‘evolutionary’.<sup>52</sup> The Court held that the evolutionary nature of these words was intended. In *Netherlands (PTT) and the Post Office (London) v Ned Llyod*, the Netherlands District Court of Rotterdam held that it was reasonable to include telephone cables in interpreting a provision that referred to telegraph cables. This was despite the fact that telephone cables had not been developed at the time the Convention was concluded.<sup>53</sup>

An evolutionary interpretation has allowed the Refugee Convention to cover instances such as gender-based persecution, though it is not directly mentioned as a ground in the Convention definition. For instance, in *Re Kasinga*, the United States Board of Immigration Appeals held that the practice of female genital mutilation can be the basis for a claim of persecution.<sup>54</sup>

In the *Dispute Regarding Navigational and Related Rights* the Court laid down factors to be considered as giving rise to a presumption that the

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<sup>49</sup> *Ibid* 257.

<sup>50</sup> *Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (2005) 27 RIAA 35, 73 para 80.

<sup>51</sup> Sinclair as cited in Hathaway (n 37) 66.

<sup>52</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia* [1971] ICJ Rep 6, 19 para 53.

<sup>53</sup> *Netherlands (PTT) and the Post Office (London) v Ned Llyod* 74 International Law Reports 212.

<sup>54</sup> *In re Fauziya Kasinga* (n 09) 357.

parties intended the terms to have an evolving meaning.<sup>55</sup> *Firstly*, the parties should have used generic terms in the treaty with the awareness that the meaning of the terms was likely to evolve over time. In that case, the term *comercio* (for the purposes of commerce) was considered a generic term as it referred to a ‘class of activity’.<sup>56</sup> *Secondly*, the treaty entered into should be for a very long period or is ‘of continuing duration’.<sup>57</sup> The court stated that they will consider whether the treaty was entered into for an unlimited duration and to the object of the treaty concerned, when determining whether the treaty was ‘of continuing duration’. Though the application of the Refugee Convention was initially stipulated to cover events that took place before 1 January 1951, the Protocol to the Refugee Convention has extended the applicability of the Convention to all persons claiming refugee status, including those claiming such status in the future. Thus, the Convention is ‘of continuing duration’.

A generic term is general and descriptive of a broad group or class of things.<sup>58</sup> In *Kasikili/Sedudu Islands*, Judge Higgins defined a generic term as ‘a known legal term, whose content the parties expected would change through time’.<sup>59</sup> Persecution is a general term encompassing a broad range of persecutory acts. The social group is also a general and descriptive term that covers a wide range of groups such as social groups defined by gender, sexual orientation, procreation, age, family, and socioeconomic status.<sup>60</sup>

The content of the terms ‘well-founded fear of being persecuted’ and ‘membership in a particular social category’ were intended to change over time. ‘Persecution’ is neither defined by the Convention, the *UNHCR Handbook*, or the *Travaux Préparatoire*. The term was deliberately left undefined because the drafters intended to introduce a flexible concept that encompasses all future types of persecution so that it can be applied to

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<sup>55</sup> *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213.

<sup>56</sup> *Ibid* para 67.

<sup>57</sup> *Ibid* 243. See, *Pulp Mills (Argentina v Uruguay)* [2010] ICJ Rep 14, 32 where the Court emphasized that the Statute’s interpretation should remain current and evolve in accordance with changes in environmental standards.

<sup>58</sup> Chang-fa Lo (n 48) 261.

<sup>59</sup> *Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] ICJ Rep 1045, 113 Declaration of Judge Higgins.

<sup>60</sup> Schoenholtz (n 43) 109.

novel circumstances.<sup>61</sup> Thus, the indeterminate nature of the terms has allowed the concept to evolve in response to the ‘changing nature of persecution’ and the ‘changing sensibilities of our own societies’.<sup>62</sup>

The Convention debates reveal that the phrase ‘membership in a particular social group’ was a ‘throw-away-line’ included at the request of the Swedish representative at the Conference of Plenipotentiaries held in Geneva in 1951.<sup>63</sup> The ratifying history does not indicate that there is a set of identifiable groups that might qualify under this ground.<sup>64</sup> Further, decisions relating to the ‘particular social group category’ do not produce predictable and principled outcomes.<sup>65</sup> Thus the lack of a consistent and predictable approach in determining a social group and the treaty history indicate that the social group category was added to cover those persecuted for reasons which are not explicitly stated in the Convention.<sup>66</sup> In *Ex Parte Shah*, Lord Hoffman stated that the ‘concept of a social group is a general one and its meaning cannot be confined to those social groups which the

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<sup>61</sup> Francesco Maiani, ‘The Concept of “Persecution” in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach’ (2010) *Les Dossiers du Grihl* <<https://journals.openedition.org/dossiersgrihl/3896> > accessed 17 April 2020; UNHCR, ‘The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’ [2001].

<sup>62</sup> *Ibid.*

<sup>63</sup> “[E]xperience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.”: UNGA, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Third Meeting held at the Palais des Nations, Geneva*, UN doc. A/CONF.2/SR.3 (19 November 1951); See Aleinikoff, ‘Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group’ in Feller, E., Turk, V. and Nicholson, F. (eds), *Refugee Protection in International Law: UNHCR’s Global Consultation on International Protection* (Cambridge University Press, 2003).

<sup>64</sup> UNHCR, ‘Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees UN doc HCR/02/02, para 3.

<sup>65</sup> Mirko Bagaric and Kim Boyd, ‘How to Spot a Particular Social Group in Refugee Law’ (2005) 1 *Original Law Rev* 26, 34.

<sup>66</sup> *Ibid* 36.

framers of the Convention may have had in mind'.<sup>67</sup> He opined that the framers of the Convention chose the general term 'particular social group' as opposed to an enumeration of specific social groups, because they intended 'to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention'.<sup>68</sup> In the same case Lord Hope pointed out that there was no uniform interpretation to the term 'particular social group' and stressed that an 'evolutionary approach... must be taken to international agreements of this kind'.<sup>69</sup> Therefore, 'membership of a particular social group' is a generic term which is evolving in line with society's understanding of groups within it.<sup>70</sup>

Where a term is classified as generic, a presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.<sup>71</sup> Such an evolutionary interpretation should take into account the context in which the generic terms are used and the object and purpose of the treaty. The preamble to the Refugee Convention recognises 'the social and humanitarian nature of the problem of refugees' and that human beings should enjoy 'fundamental rights and freedoms without discrimination' as enshrined in the United Nations Charter and the UDHR. The preamble further considers that the United Nations has endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms. Thus, the preamble establishes the humanitarian spirit of the Convention and seeks to provide the widest possible protection to refugees. The *travaux préparatoire* of the Refugee Convention indicate that the Convention was written with the intent of protecting all persons and groups that existed in Europe, who were or who were likely to be victims of persecution.<sup>72</sup> Thus, an evolutionary interpretation of Article 1(A) (2) of

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<sup>67</sup> *Islam v Secretary of State for the Home Department and Regina v Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] UKHL 1.

<sup>68</sup> *Ibid* 5.

<sup>69</sup> *Ibid* 21.

<sup>70</sup> See European Council on Refugees and Exiles 'Position on the Interpretation of Article 1 of the Refugee Convention' [2000] The ECRE Compilation, para 56.

<sup>71</sup> *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 1978 3, 32; *Iron Rhine Railway* (n 61) 73.

<sup>72</sup> Schoenholtz (n 43) 108.

the Refugee Convention extending protection to climate change refugees is in line with the humanitarian objective of the Refugee Convention.

#### 4. A HUMAN RIGHTS-BASED APPROACH TO THE DEFINITION OF A REFUGEE

The adoption of a human rights-based approach in determining the two key elements, namely ‘being persecuted’ and ‘particular social group’, is grounded in domestic case law. Due to the absence of a centralised adjudicatory body for international refugee law, decisions by national courts play a crucial role.<sup>73</sup>

In *Ward*, the Supreme Court of Canada stated that underlying the Convention was the international community’s commitment to the assurance of basic human rights without discrimination which is indicated in the preamble to the treaty.<sup>74</sup> The Court pointed out that this theme outlined the boundaries of the objectives sought to be achieved and consented to by the delegates.<sup>75</sup> Citing Hathaway, the Court stressed that refugee law concerns itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard to assess the refugee status.<sup>76</sup> Thus, in *Ward*, the Court advocated a human rights-based approach in determining the boundaries of key elements such as ‘persecution’ and ‘particular social group’.

##### *4.1 Persecution*

‘Persecution’ entails two elements: *firstly*, the infliction of serious harm and *secondly*, a failure of State protection.<sup>77</sup> In *Ward* persecution was defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. In *BG (Fiji)*, the New Zealand Immigration Tribunal stated that the forms of serious harm and

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<sup>73</sup> UNHCR, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees’ UN Doc PPLA/2017/01 (July 2017) 1.

<sup>74</sup> *Ward* (n 29).

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Refugee Appeal No 71427* (16 August 2000) para 67; Nishimura (n 07).



whether there has been a failure of State protection can be determined through the ‘prism of international human rights law.’<sup>78</sup> The ‘human rights approach to being persecuted’ adopted by the New Zealand Immigration and Protection Tribunal, uses core international human rights treaties as the basis for determining its extent.<sup>79</sup>

#### 4.1.1 *Serious Harm*

Persecution could take many forms of harm ranging from physical harm to the loss of intangibles.<sup>80</sup> Article 31 and Article 33 of the Refugee Convention imply that threats to life or freedom on account of a Convention ground could constitute persecution under Article 1 of the Convention.<sup>81</sup> Further, other serious violations of human rights are also considered to constitute persecution.<sup>82</sup> When various elements are taken together such as discrimination in different forms, perhaps combined with a general atmosphere of insecurity in the country of origin, could result in well-founded fear of persecution on ‘cumulative grounds’.<sup>83</sup> This allows a refugee seeker to show that events, which may not on their own amount to persecution but together with ‘other adverse factors’, have led to the well-founded fear of persecution.<sup>84</sup> For instance, in *Refugee Appeal No*

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<sup>78</sup> *BG (Fiji)* [2012] NZIPT 800091 para 76.

<sup>79</sup> *Ibid* para 89.

<sup>80</sup> *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] 216 CLR 473 para 40 as per McHugh and Kirby JJ.

<sup>81</sup> UNHCR, *The Refugee Convention, 1951: The Travaux Préparatoires Analyzed with a Commentary by Dr. Paul Weis* 9.

<sup>82</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN doc HCR/1P/ENG/REV.4 (1979, reissued 2019) 21, para 51.

<sup>83</sup> *Ibid* para 53.

<sup>84</sup> Cary, 'Differing Interpretations of the Membership in a Particular Social Group Category and Their Effects on Refugees' (2016) 41 *Oklahoma City University Law Review* 241, 247; See Article 9(1)(a) of the EC Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees which states that acts of persecution must ‘(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights ... or (b) be an accumulation of various measures, including

74665/03, the Refugee Status Appeals Authority of New Zealand stated that the right to life (Article 6 of the ICCPR) in conjunction with the right to adequate food (Article 11 ICESCR) should permit a finding of ‘being persecuted’ where an individual faces a real risk of starvation.<sup>85</sup> Further, persecution should be of a nature that a person cannot reasonably be expected to tolerate it, by reason of its intensity or duration.<sup>86</sup>

The primary question to be determined is whether the impacts of climate change contribute to a serious violation of human rights. Climate change is considered to be one of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.<sup>87</sup> A violation of civil and political rights from which no derogation is permissible, such as the right to life encapsulated in Article 6 of the ICCPR,<sup>88</sup> is *per se* sufficiently severe to constitute ‘persecution’.<sup>89</sup> The right to life encompasses ‘the entitlement of individuals to be free from acts or omissions that are intended or may be expected to cause their unnatural or premature death, as well as *to enjoy a life with dignity*’ (emphasis added).<sup>90</sup> It includes ‘all that goes along’ with the right to life, namely the ‘bare necessities of life’ such as ‘adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings’.<sup>91</sup> It also includes the ‘right to livelihood because, no person can live without the means of living, that is, the means of livelihood’.<sup>92</sup> Thus, the right to life includes concerns pertaining to the *quality* of life and not merely about the existence of a human being.

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violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).’

<sup>85</sup> (7 July 2004) para 89.

<sup>86</sup> *Appellant S395/2002* (n 96) para 40.

<sup>87</sup> UNCHR, ‘General comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (2018) UN docCCPR/C/GC/36para 62.

<sup>88</sup> *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>89</sup> Maiani (n 61).

<sup>90</sup> UNCHR, ‘General comment No 36 (2018)’ (n 87) para 3.

<sup>91</sup> *Francis Coralie v Delhi Administration* [1981] AIR 746, 753 (SC) as per Bhagwati J.

<sup>92</sup> *Olga Tellis v Bombay Municipal Corporation* [1986] AIR 180 (SC).

Further, it should be noted that human rights and fundamental freedoms are universal, indivisible, interdependent, and interrelated.<sup>93</sup> A ‘life with dignity’ requires an adequate standard of living.<sup>94</sup> The UDHR provides that everyone has a right to a standard of living that ensures the health and well-being of himself and his family, including food, clothing, housing, and medical care, necessary social services as well as ‘the right to security in the event of unemployment, sickness... or other lack of livelihood in circumstances beyond his control’.<sup>95</sup> All these rights are threatened or violated in the case of those facing impacts of climate change. Thus, when a climate change refugee’s right to life is violated or threatened to be violated in its fullest sense, a finding of persecution can be made.

In 2018, the Intergovernmental Panel on Climate Change noted that there was an increased frequency, intensity, and duration of extreme weather events such as the melting of glaciers and ice sheets, rising sea levels, storm surges, flooding, heatwaves, droughts, wildfires, etc.<sup>96</sup> The number of extreme weather events has doubled since the early 1990s,<sup>97</sup> which indicates that climate change impacts will only exacerbate in the years to come. These impacts violate people’s right to life, health, food water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture, etc.<sup>98</sup>

#### 4.1.2 Failure of State Protection

A finding of a failure of State protection can be made in four situations.<sup>99</sup> When the State concerned (1) commits, (2) condones, (3) tolerates, or (4) either refuses or is unable to offer adequate protection, there would be persecution. State protection should be determined based on whether the

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<sup>93</sup> UNGA, *Vienna Declaration and Programme of Action*, UN doc A/CONF.157/23 (12 July 1993) para 5.

<sup>94</sup> Eide, ‘Adequate Standard of Living’ in Moeckli, D., Shah, S. and Sivakumaran, S. (eds) *International Human Rights Law* (Oxford University Press 2018) 187.

<sup>95</sup> UDHR, Art 25(1).

<sup>96</sup> United Nations Human Rights Special Procedures (n 02).

<sup>97</sup> *Ibid.*

<sup>98</sup> See *Ibid*18.

<sup>99</sup> *Refugee Appeal No. 71427/99* New Zealand Refugee Status Appeals Authority para 60.

protection available from the State will ‘reduce the risk of serious harm to below the level of well-foundedness’ or ‘below the level of a real chance of serious harm’.<sup>100</sup> With regard to climate change refugees, the State could be *unable to offer adequate protection* because of resource constraints or the sheer magnitude of the impact, making it impossible for the State to offer adequate protection. For instance, sea level rise and its consequent inundation of land are beyond the control of the State.

One could argue that the persecutor is nature. There is no bar in the Refugee Convention against such construction as the definition does not articulate the type of persecutor. The Refugee Convention does not require serious harm and the failure of State protection to emerge from a single source.<sup>101</sup> However, if one were to argue that human intervention is necessary for the perpetration of persecution, it could be contended that the impacts of climate change are results of human activities such as the burning of fossil fuels and biomass, deforestation, and industrial agriculture.<sup>102</sup> In *Greenpeace Southeast Asia et al.*<sup>103</sup> the Philippines Commission on Human Rights found that fossil fuel corporations can be held legally liable for their contribution to climate change and the resultant impact which violate human rights.<sup>104</sup> The Council of Europe has recognised that the ‘industrialised member States of the Council of Europe’ have a ‘particular responsibility’ to countries, especially the countries of the ‘global South’ affected by ‘*man made climate change*, and should therefore provide appropriate asylum for *climate refugees*.’ (emphasis added).<sup>105</sup> These cases establish the undeniable link between human activities and the impacts of climate change. In any case, it should

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<sup>100</sup> *Ibid* para 66.

<sup>101</sup> Nishimura (n 07).

<sup>102</sup> See United Nations Human Rights Special Procedures (n 02) 12.

<sup>103</sup> Republic of the Philippines Commission on Human Rights, ‘Press Release: CHR concluded landmark inquiry on the effects of climate change to human rights; expects to set the precedent in seeking climate justice.’ (13 December 2018) 2.

<sup>104</sup> Isabella Kaminski, ‘Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules’ (*Climate Liability News*, 9 December 2019) <<https://www.climateliabilitynews.org/2019/12/09/philippines-human-rights-climate-change-2/>> accessed 25 April 2020.

<sup>105</sup> Parliamentary Assembly (n 05) para 5.4.

be noted that the Refugee Convention focuses on the predicament of the refugee as opposed to the nature of the persecutor.<sup>106</sup>

Therefore, when States are unable to protect their citizens from the adverse impacts of climate change to an extent that their basic human rights are protected, persecution can be established.

#### 4.2 A “Particular Social Group”

While this category should not be treated as a “catch all” which is applicable to all those fearing persecution, it should be read in an “evolutionary manner” taking into account the diverse and changing nature of groups in various societies and evolving international human rights norms.<sup>107</sup>

In *Canada v Ward*, La Forest J stated that membership of a particular social group includes (1) groups defined by innate or unchangeable characteristics (such as gender, linguistic background and sexual orientation), (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>108</sup> Elaborating on the second group, in *Chan v Canada (Minister of Employment and Immigration)* which concerned an application by the appellant seeking refugee status because of his fear of being forcibly sterilised as part of China’s one-child birth control laws, La Forest J pointed out that the association or group exists by virtue of a common attempt made by its members to exercise a fundamental human right.<sup>109</sup> The right inserted in this

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<sup>106</sup> UNHCR, ‘Guidelines for International Protection No. 09: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’ UN doc HCR/GIP/12/09 (2012) para 39.

<sup>107</sup> *Ibid* 94; UNHCR, ‘Guidelines on International Protection: “Membership of a Particular Social Group”’ (n 64) para 3; See Helton, ‘Persecution on Account of Membership in a Social Group As a Basis for Refugee Status’ [1983], 15 *Columbia Human Rights Law Review* 39, 45 where the writer advocates the position that the social group category was meant to be a catch-all phrase covering all types of persecution.

<sup>108</sup> *Ward* (n 29); Bagaric and Boyd (n 65) 29.

<sup>109</sup> [1995] 3 SCR 593 para 87.

case was categorised as the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children.<sup>110</sup>

Similarly, in *Vidhani*, the court stated that women who are forced into marriage against their will have had a basic human right, namely the right to enter freely into marriage, violated.<sup>111</sup> The association can be characterized as women asserting their right to marry freely which is an association so fundamental that the claimant should not be forced to forsake it.<sup>112</sup> Thus, the question is whether the right involved is a basic human right and whether the exercise of that right is so fundamental to the claimant's dignity and self-worth that he or she should not be required to forsake it.<sup>113</sup>

In the context of climate change, 'a particular social group' exists because of the common attempt made by its members to exercise the right to a healthy environment. The advisory opinion of the Inter-American Court of Human Rights (IACtHR) on the environment and human rights recognises the right to a healthy environment as being fundamental to the existence of humanity.<sup>114</sup> The *African Charter on Human Rights* recognises the right of peoples to a 'general satisfactory environment favourable to their development'.<sup>115</sup> The Aarhus Convention recognises that 'every person has the right to live in an environment adequate to his or her health and

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<sup>110</sup> *Ibid* para 88; 'Although Justice La Forest's comments on the issue of particular social group were made in dissent, they represented the views of two other Supreme Court Justices, not contradicted by the majority, and clarified his reasoning in *Ward* which was a unanimous judgment of the Court.'; Daley and Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' [2000] 12(2) *International Journal of Refugee Law* 148, 151.

<sup>111</sup> *Vidhani v Canada* (Minister of Citizenship and Immigration) [1995] 3 FC 60 (T.D) as cited in Daley and Kelley (n 110) 168.

<sup>112</sup> *Ibid* 168.

<sup>113</sup> *Ibid* 170.

<sup>114</sup> Feria-Tinta and Milnes, 'The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights' [2016] 27(1) *Yearbook of International Environmental Law* 64.

<sup>115</sup> *African Charter on Human and Peoples' Rights* (entered into force 21 October 1996) CAB/LEG/67/3 rev. 5, 21 ILM 58 Art 24.

well-being'.<sup>116</sup> The right to a healthy environment is a constitutionally guaranteed right in several states.<sup>117</sup>

Further, in *Future Generations v Ministry of Environment and others* the Supreme Court of Colombia recognised a fundamental right to enjoy a healthy environment, the absence of which was making Colombians sick.<sup>118</sup> In *Gbemre v Shell Petroleum Development Company of Nigeria Ltd*,<sup>119</sup> the Federal Court of Nigeria held that flaring methane in the course of oil exploration and production activities violated the right to a clean and healthy environment. In *Leghari v Federation of Pakistan*, the High Court of Lahore recognized the right to a healthy and clean environment as part of the fundamental right to life. Therefore, though the core international human rights treaties do not recognise an explicit right to a healthy environment or a stable climate, it is now an integral part of the international human rights law framework given that the right is codified in international human rights treaties, soft-law instruments, regional human rights agreements, national constitutions, etc.<sup>120</sup> Thus, climate change refugees could be considered as members of a particular social group because of their common attempt to exercise the basic right to a healthy environment.

The adoption of a human rights-based approach in determining both elements does not discount the validity of either element or imply that the constitution of both elements is similar. Persecution is the harm inflicted

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<sup>116</sup> *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (25 June 1998) 2161 UNTS 447.

<sup>117</sup> For example, the Constitution of Columbia (1991) in Article 79 states: 'Every individual has the right to enjoy a healthy environment. The law will guarantee the community's participation in the decisions that may affect it.'; The Constitution of Bolivia in Article 33 states that people have the right to a healthy, protected and well balanced environment; The Constitution of South Africa states that everyone has the right to an environment that is not harmful to their health or well-being (Article 24); The Constitution of Norway states that every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. (Article 110(b)).

<sup>118</sup> *Demanda Generacions Futuras v Minambiente* [2018]. A translation can be found at <[http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405\\_11001-22-03-000-2018-00319-00\\_decision-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-1.pdf)> accessed on 22 April 2020.

<sup>119</sup> *Gbemre v Shell Petroleum Development Company of Nigeria Ltd* FHC/B/CS/53/05, 29.

<sup>120</sup> UN Environment (n 16).

or feared by the person for a reason set out in the Convention. A human rights-based approach is adopted to determine whether the harm feared amounts to persecution under the Convention. For instance, violence, arbitrary detentions, systemic discrimination, and psychological harm are persecutory because they concern a violation of basic human rights such as the right to life, liberty, and security of the person.<sup>121</sup> In the case of determining a particular social group, a human rights-based approach is used to determine whether the right sought to be exercised is a fundamental human right.<sup>122</sup> For instance, in the case of climate change refugees, the impacts of climate change are persecutory because it violates the right to life. However, in determining the social group, the analysis focused on the right to a healthy environment because this is the right such victims seek to exercise and pursue.

##### 5. THE PREDICAMENT OF IOANE TEITIOTA AS A “CLIMATE CHANGE REFUGEE”

Jane McAdam argues that ‘persecution’ entails violations of human rights that are sufficiently serious, either because of their inherent nature or because of an accumulation of breaches that individually are not so serious, but together constitute a severe violation. Therefore there is a difficulty in characterizing climate change as persecution.<sup>123</sup> However, an analysis of the plight of Ioane Teitiota from Kiribati demonstrates that the impact of climate change in the enjoyment of basic human rights was sufficiently ‘serious,’ that the ‘intensity’ and ‘duration’ required is satisfied and that Teitiota could not reasonably be expected to tolerate it.

Kiribati is a State with 33 islands threatened to be inundated by rising sea levels.<sup>124</sup> The Human Rights Committee has noted that the situation in Tarawa, which is the capital of Kiribati, was increasingly ‘unstable’ and

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<sup>121</sup> Daley and Kelley (n 111) 173.

<sup>122</sup> *Ibid* 174.

<sup>123</sup> Jane McAdam, *Climate Change Displacement and International Law*, Side Event to the High Commissioner’s Dialogue on Protection Challenges (Geneva 8 December 2010) 1-2.

<sup>124</sup> Mike Bowers, ‘Waiting for the tide to turn: Kiribati’s fight for survival’ (*The Guardian*, 23 October 2017) <<https://www.theguardian.com/world/2017/oct/23/waiting-for-the-tide-to-turn-kiribatis-fight-for-survival>> accessed 10 April 2020.



‘precarious’ due to the sea level rise caused by global warming.<sup>125</sup> The State is mired by several adverse issues such as the scarcity of drinking water and unemployment.<sup>126</sup> There was a difficulty in growing crops due to coastal erosion, salt-water inundation, droughts<sup>127</sup> and the infertility of the soil.<sup>128</sup> Fishing was also in jeopardy because of the depletion of fish stocks.<sup>129</sup> Overpopulation and the scarcity of land has caused social tensions which in certain cases has resulted in death.<sup>130</sup> The health of the population has deteriorated as evinced by vitamin A deficiencies, malnutrition, fish poisoning, and other ailments.<sup>131</sup>

In *AF (Kiribati)*, Teitiota, a citizen of Kiribati, appealed against the decision of a New Zealand refugee and protection officer who declined to grant him refugee status.<sup>132</sup> The Tribunal pointed out that though there were tensions over land which resulted in injuries and death, the claimant himself has not been subjected to such disputes and therefore there was no real chance of him suffering serious physical harm from such violence.<sup>133</sup> It stated that though there was no house available in the long term, the land would be available to the claimant at least in one of the home islands, even though the space was limited and he would have to share it with relatives. The Tribunal pointed out that this land could ‘provide them with access to sufficient resources to sustain themselves to an adequate level.’ However, even if this predicament alone does not qualify as persecution, when it is viewed alongside other ‘adverse factors’ objectively, such as the difficulty to grow crops, difficulty in accessing portable water, and deteriorating health conditions, a finding of persecution can be made on cumulative grounds. This had led to the serious violation of the right to life and other associated rights such as the right to shelter, adequate nutrition, water, health, and livelihood. Thus, these various threats to human rights, in their

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<sup>125</sup> *Ioane Teitiota* (n 12) para 2.1

<sup>126</sup> *AF (Kiribati)* (n 34) para 16.

<sup>127</sup> *Ibid* para 9.

<sup>128</sup> *Ioane Teitiota* (n 12) para 2.4 and 2.5

<sup>129</sup> *AF (Kiribati)* (n 34) para 9.

<sup>130</sup> *Ioane Teitiota* (n 12) para 2.4.

<sup>131</sup> *Ibid* para 2.3

<sup>132</sup> *AF (Kiribati)* (n 34) para 1.

<sup>133</sup> *AF (Kiribati)* (n 34) para 72.

cumulative effect have denied human dignity.<sup>134</sup> Teitiota could not reasonably be expected to tolerate such prolonged and repeated violations.

These effects are of a permanent nature. The New Zealand Supreme Court pointed out that there was no evidence that the Government of Kiribati was failing to take steps to protect its citizens from the effects of environmental degradation to the extent it could.<sup>135</sup> However, the Supreme Court ignored the fact that the island was under threat of inundation by sea level rise and the island was also facing other impacts of climate change which cumulatively makes the State *unable to offer adequate protection*. Satellite data indicate that the sea level has risen across Kiribati by 1-4mm per year since 1993.<sup>136</sup> Though the State could alleviate such impacts for instance, by providing rationed supplies of water and by building sea walls, these have been inadequate.<sup>137</sup> The state is powerless to stop the sea-level rise.<sup>138</sup> In *Ioane Teitiota v New Zealand*, the Human Rights Committee stated that ‘given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity *before the risk is realized*’.<sup>139</sup> (emphasis added) The protection provided by the State should reduce the risk of serious harm to below the level of a real chance of serious harm. The protection provided by the State of Kiribati does not meet this standard as it is impossible to mitigate the cumulative impact of climate change to a standard that ensures the protection of human rights. Therefore, there is a failure of State protection.

Further, Teitiota is a member of a ‘particular social group’ which is defined by the common attempt made by its members to exercise the right to a healthy environment, which is a right fundamental to the existence of humanity. This is a right fundamental to Teitiota’s dignity and self-worth that he could not be asked to forsake. This right encompasses the protection

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<sup>134</sup> See Refugee Appeal No. 71427/99[2000] New Zealand Refugee Status Appeals Authority para 53.

<sup>135</sup> *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 para 12.

<sup>136</sup> International Climate Change Adaptation Initiative, ‘Current and future climate of Kiribati’ [2011] Pacific Climate Change Science Program 4.

<sup>137</sup> *AF (Kiribati)* (n 34) para 30; *Ioane Teitiota* (n 12) para 2.4.

<sup>138</sup> *AF (Kiribati)* (n 34) para 30.

<sup>139</sup> *Ioane Teitiota* (n 12) para 9.11.

of the core elements of the natural environment that enable a life of dignity, such as clean water, air, and soils indispensable for human health and security.<sup>140</sup> As Teitiota and his family's survival is threatened by the persecutory conduct described above, he could be considered as a member of a social group pursuing the right to a healthy environment which would enable him to live a life with dignity. Accordingly, he could have been considered a refugee under the Refugee Convention.

## 6. ARGUMENTS AGAINST THE INCLUSION OF CLIMATE REFUGEES UNDER THE CONVENTION

This part seeks to counterargue several arguments put forward against the inclusion of climate change refugees under the Refugee Convention.

Firstly, it has been argued that the definition contains an exhaustive list of grounds for which the Convention applies and the Convention does not permit the interpretation of reasons for persecution.<sup>141</sup> However, as this paper has indicated, the Refugee Convention has been treated as a 'living instrument' and the terms 'being persecuted' and 'particular social group' have been interpreted in an evolutive manner, taking into account the current context, thus extending the application of the Convention to novel circumstances.

Secondly, it has been pointed out that identifying a 'persecutor' in the context of climate change is problematic.<sup>142</sup> It has been pointed out that arguing that the 'persecutor' was the international community on account of its failure to reduce greenhouse gas emissions, reverses the traditional refugee paradigm which requires a refugee to flee his own government or a non-State actor whom the government is unwilling or unable to protect him. Therefore, as 'the claimant is seeking, refuge within the very countries that are allegedly "persecuting" him' refugee protection has been denied.<sup>143</sup> However, according to the UNHCR, the source of the feared

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<sup>140</sup> Marcos Orellana, 'The Case for a Right to a Healthy Environment' (Human Rights Watch, 1 March 2018) <<https://www.hrw.org/news/2018/03/01/case-right-healthy-environment>> accessed 24 April 2020).

<sup>141</sup> Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 *Law & Policy* 502, 508.

<sup>142</sup> McAdam (n 123) 2.

<sup>143</sup> *Ioane Teitiota* (n 12) para 55.

harm is ‘of little, if any, relevance to the finding whether persecution has occurred, or is likely to occur’.<sup>144</sup> The focus is on the protection of refugees and the well-foundedness of fear of actual or potential harm which is serious enough to amount to persecution for a reason enumerated in the Convention.<sup>145</sup> The Convention focuses on the predicament of the person and seeks to ensure his fundamental human rights. Denying such protection on the ground that such a construction reverses ‘the traditional refugee paradigm’ and that the claimant seeks protection from the alleged persecutory countries is contrary to the humanitarian spirit of the Convention, as the focus is on fulfilling the humanitarian needs of those displaced.

Thirdly, the indiscriminate nature of environmental impact has been cited as another reason to deny climate change refugees protection under the Convention.<sup>146</sup> The argument is that the impacts of climate change are indiscriminate, rather than tied to particular characteristics such as a person’s background or beliefs.<sup>147</sup> However, as the UNHCR has pointed out, under Article 1, it is not relevant how large or how small the affected group would be.<sup>148</sup> Further, the fact that all members of the community are equally affected does not in any way undermine the legitimacy of individual claims.<sup>149</sup> Instead such facts should contribute towards strengthening the perception that the group is persecuted.<sup>150</sup>

Fourthly, it has been argued that climate change refugees do not constitute a ‘particular social group’ because the group must be connected by a fundamental, immutable characteristic other than the risk of persecution.<sup>151</sup> As articulated by Canadian case law, an association or group which exists by virtue of a common attempt by its members to exercise a fundamental

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<sup>144</sup> UNHCR, ‘The International Protection of Refugees: Interpreting Article 1’ (n 61) 6.

<sup>145</sup> *Ibid* 6

<sup>146</sup> *AF (Kiribati)* (n 34) para 75; *Ioane Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 para 28.

<sup>147</sup> *McAdam* (n 123) 2.

<sup>148</sup> UNHCR, ‘The International Protection of Refugees: Interpreting Article 1’ (n 61) 6.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Ibid*.

<sup>151</sup> *McAdam* (n 123) 3.

human right, constitutes a particular social group.<sup>152</sup> In the context of climate change refugees, they are united by the common attempt to exercise the right to a healthy environment.

Fifthly, another argument is that the inclusion of such refugees under the Convention will open the floodgates. In *Ioane Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* the High Court of New Zealand pointed out that deciding in favour of Teitiota would open the floodgates to millions of others facing similar hardships caused by climate change.<sup>153</sup> Such an argument is untenable and contradicts the very essence of the Refugee Convention. The Convention is based upon a high level of compassion and hospitality.<sup>154</sup> The 1951 drafters sought to create equality and egalitarianism for the refugees.<sup>155</sup> Further, the other four grounds namely race, religion, nationality, and political opinion imply that large groups of people can be persecuted.<sup>156</sup>

However, this opposition indicates that the focus is now on the seeming threat to the privileged States rather than the predicament of climate change refugees. It is estimated that by 2050 the number of climate change refugees will far exceed the number of traditional refugees.<sup>157</sup> When there is no explicit ban against the inclusion of such refugees under the Convention, and when the Convention promotes compassion and hospitality, the spirit of the Convention requires that the definition be extended to climate change refugees. The object and purpose of the Refugee Convention are best served by applying it to climate change refugees.

## 7. CONCLUSION

Extending refugee protection to climate change refugees does not imply that all those who are affected by climate change will qualify for refugee protection. Just as is required for applicants seeking refugee status on other

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<sup>152</sup> *Chan* (n 109) para 87; *Ward* (n 29).

<sup>153</sup> [2013] NZHC 3125 para 51.

<sup>154</sup> *Mcfadyen* (n 28) 12.

<sup>155</sup> *Ibid* 12.

<sup>156</sup> The ECRE Compilation (n 82) para 56; See UNHCR, 'The International Protection of Refugees: Interpreting Article 1' (n 61).

<sup>157</sup> *Mcfadyen* (n 28) 17.

grounds, climate change refugees need to fulfill the requirements under the Convention definition of a refugee. There should be a “well-founded fear of being persecuted” for a Convention ground, namely, “membership in a particular social group.” The impact of climate change should be of a permanent nature that they are left with no choice but to cross borders seeking refuge. The determination should be done on a case by case basis.

This paper advocates that an evolutionary interpretation and a human rights-based approach require that climate change refugees be considered under the Refugee Convention. An evolutionary interpretation requires “persecution” and “social group” to be interpreted in an evolutive manner taking into account changing circumstances. The human rights analysis under persecution focuses on the harm inflicted or threatened, namely the violation of the right to life and other associated rights. The analysis under the “particular social group” focuses on the human right that is pursued, namely the right to a healthy environment. Utilising an evolutionary interpretation together with a human rights-based approach to justifying the extension of protection for climate change refugees is also in keeping with the humanitarian spirit of the Convention. Such an interpretation ensures that the Refugee Convention withstands the test of time.

