

Enhancing Protection of “Climate Refugees” in Destination Hubs: A Comparative Analysis of Legal Mechanisms and Governance Challenges in the United States and India

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ABSTRACT

The plight of climate refugees is a global crisis that requires global cooperation and regional responses. The United States and India are important regional destination countries for climate refugees. “Climate refugees” are not recognized as a category of people entitled to protection in either country; however, legal mechanisms in both countries can be applied to cross-border displacement due to climate change. Part I of the article introduces the challenge of defining the term “climate refugees.” Part II addresses legal mechanisms in India that can be used to protect people displaced across the border as refugees or protected persons, and Part III reviews these mechanisms in the United States. Part IV evaluates what the United States and India can learn from best practices in climate migration legislation in Europe and international human rights law. It also explores what these two countries can learn from each other’s best practices in developing governance frameworks for climate refugees.

INTRODUCTION

The term “climate refugees” is multi-dimensional and fraught with controversy. It is a product of the global climate change crisis,¹ and reflects both the failure² of and opportunity³ for international governance on the issue.⁴

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1. See generally Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, 6 SCI. & POL’Y FOR SUSTAINABLE DEV. 8 (2011); Carol Farbotko & Heather Lazrus, *The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu*, 22 GLOB. ENV’T CHANGE 382 (2012); Yinuo Li, *Climate Refugees: An Urgent International Dilemma Caused by Climate Disasters*, at 4 (2023) (Master’s thesis, Cornell University).

2. See Arunima Shastri & Aparna Singh, *Obscurities of Climate Change and Emerging Delinquencies vis-à-vis Climate Refugees, Problems and Suggestions in a Holistic Analysis Context*, in A HOLISTIC ANALYSIS OF LAW, CONNECTING THEORY AND PRACTICE: UNIVERSAL SOLUTIONS TO GLOBAL PROBLEMS 125, 134–35 (Charalampos (Harry) Stamelos ed., 2023).

3. See Cyprien Fluzin, *Facing the Prospect of “Mass Exodus,” Can International Law Adequately Protect “Climate Refugees” in the 21st Century?* ECOL. L.Q. at 14–15 (forthcoming) (SSRN).

4. Shastri & Singh, *supra* note 2, at 134–35.

The term is also caught in the crossfire of contested media framing,⁵ which, like the governance gaps, leads to several injustices.⁶ In addition to developing international law, national laws also offer an opportunity to protect people fleeing from the adverse effects of climate change.⁷

Climate change-related factors are forcing households and communities to leave their places of origin.⁸ The Intergovernmental Panel on Climate Change (“IPCC”) concluded that these factors include slow-onset processes like sea-level rise, rapid onset events,⁹ and increasing extreme heat events.¹⁰ It also determined that “[t]he most common climatic drivers for migration and displacement are drought, tropical storms and hurricanes, heavy rains and floods.”¹¹ The United Nations Office of the High Commissioner for Human Rights reported that 59.1 million people were internally displaced due to climate-related disasters in 2021.¹² Five million of these displaced people were displaced in India.¹³ The United Nations High Commissioner on Refugees (“UNHCR”) predicts that about 1.2 billion people will be displaced by 2050 due to climate-related disasters.¹⁴ It also projects that 13 million coastal residents in the United States

5. See generally Tanja Dreher & Michelle Voyer, *Climate Refugees or Migrants? Contesting Media Frames on Climate Justice in the Pacific*, 9 ENV’T COMM’N 58 (2014).

6. See generally Jon Barnett, *Climate Change, Insecurity, and Injustice*, in FAIRNESS IN ADAPTATION TO CLIMATE CHANGE 115 (W. Neil Adger et al. eds., 2006).

7. See Jolanda van der Vliet & Frank Biermann, *Global Governance of Climate Migrants: A Critical Evaluation of the Global Compacts*, in CLIMATE REFUGEES: GLOBAL, LOCAL AND CRITICAL APPROACHES 60, 80 (Simon Behrman & Avidan Kent eds., 2022). This Article focuses on U.S. and Indian domestic law to help address the global and regional challenge of climate migration. A discussion of international law frameworks to address the problem is largely beyond the scope of this Article.

8. *Climate change link to displacement of most vulnerable is clear: UNHCR*, U.N. NEWS (Apr. 21, 2021), <https://news.un.org/en/story/2021/04/1090432>; *Global Crises, Climate Change, Global Inequity and Displacement Undermine Development Efforts, Delegates Highlights in Third Committee*, UNITED NATIONS (Oct. 17, 2022), <https://press.un.org/en/2022/gashc4353.doc.htm> [<https://perma.cc/PU2T-F9MV>].

9. H.-O. Pörtner et al., Intergovernmental Panel on Climate Change [hereinafter IPCC], *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 3, 9 (H.-O. Pörtner et al. eds., 2022); Laura Schafer et al., *Slow-onset Processes and Resulting Loss and Damage – An Introduction, Addressing Loss and Damage from Slow-onset Process*, GERMAN WATCH, at 9 (Jan. 2021), https://www.germanwatch.org/sites/default/files/FINAL_Slow-onset%20paper%20Teil%201_20.01.pdf [<https://perma.cc/RQ4T-EBAP>] (discussing slow-onset process and rapid-onset events based in the terminology discussed in the Bali Action Plan of 2007). Rapid-onset events are also known as extreme weather events, for example cyclones or heatwaves. Their duration is measured in hours, days, or months. On the other hand, slow-onset processes are the effects of climate change that occur slowly and gradually over a period of time, for example sea level rise, the duration of which is years, decades, or centuries. *Id.*

10. *Id.* at 49.

11. *Id.* at 52.

12. “Intolerable tide” of people displaced by climate change: UN expert, OFF. U.N. HIGH COMM’R HUM. RTS. [hereinafter U.N. OHCHR] (June 23, 2022), <https://www.ohchr.org/en/press-releases/2022/06/intolerable-tide-people-displaced-climate-change-un-expert#> [<https://perma.cc/manage/create?folder=3965>].

13. Aryan Prakash, *UN report flags nearly 50 lakhs displaced in India due to climate change*, HINDUSTAN TIMES, (June 17, 2022), <https://www.hindustantimes.com/india-news/un-report-flags-nearly-50-lakhs-displaced-in-india-due-to-climate-change-101655433497673.html#> [<https://perma.cc/E82G-NNL7>].

14. Sean McAllister, *There could be 1.2 billion climate refugees by 2050. Here’s what you need to know*, ZURICH, (June 2, 2023), <https://www.zurich.com/en/media/magazine/2022/there-could-be-1-2-billion-climate-refugees-by-2050-here-s-what-you-need-to-know> [<https://perma.cc/W9S8-JV26>].

will be displaced by 2100¹⁵ and that the coastal migration crisis similarly will become more severe in India.¹⁶ These sobering statistics underscore the need to develop a legal definition of climate refugees and explore possible legal instruments and mechanisms in the United States and India to better protect them.

I. THE CHALLENGE OF DEFINING “CLIMATE REFUGEES”

Part I addresses ongoing efforts and obstacles in seeking to establish a definition of “climate refugees” under international law and under domestic law in India and the United States. The challenges are threefold: (1) whether international human rights law or international climate change law should drive the definitions of “climate refugees,” or whether it should involve cooperation between these two areas of law; (2) when a definition of “climate refugees” is established under international law, whether new and existing domestic law protections in the United States and India can apply to climate refugees who have experienced transboundary displacement; and (3) what constitutes climate change-induced displacement sufficient to trigger protection as a “climate refugee” given that many climate refugees relocate for cultural, economic, and political factors in addition to climate-related stressors?

Under existing international refugee law, environmental factors do not enable displaced persons to secure protection as “refugees.”¹⁷ Moreover, states have persistently resisted expanding the scope of the definition of refugees under the 1951 Convention relating to the Status of Refugees¹⁸ and under the United Nations Framework Convention on Climate Change (“UNFCCC”).¹⁹ It also remains unclear under what international organization’s jurisdiction climate refugees may be able to secure protection. The UNHCR²⁰ and the

15. Linda Poon, *Tracking the Erratic Path of US Climate Migrants*, BLOOMBERG (Mar. 7, 2023), <https://www.bloomberg.com/news/articles/2023-03-07/forget-managed-retreat-us-climate-migration-will-be-chaos> [https://perma.cc/HN7B-YJKF].

16. Murali Krishnan, *India: Migration from climate change getting worse*, DW (Apr. 19, 2023), <https://www.dw.com/en/india-migration-from-climate-change-getting-worse/a-65369043> [https://perma.cc/Q849-ASSH].

17. Gaim Kibreab, *Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate*, 21 DISASTERS 20, 21 (1997).

18. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; see also Oli Brown, *Climate Change and Forced Migration: Observations, Projections and Implications*, U.N. DEV. PROG. [hereinafter UNDP], at 2–7 (Jan. 15, 2008) (background paper for the 2007 human development report). See also COSMIN CORRENDEA, LEGAL PROTECTION OF THE SINKING ISLANDS REFUGEES 24–27 (2016) (discussing the proposal at a 2006 meeting of state representatives, organized by the Maldives, to amend the 1951 Refugee Convention and its protocol to include environmental factors and climate change into the international refugee law).

19. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; see also Tetsuji Ida, *Climate Refugees – The World’s Forgotten Victims*, RACE TO RESILIENCE, RACE TO ZERO (June 21, 2021), <https://climatechampions.unfccc.int/climate-refugees-the-worlds-forgotten-victims/> [https://perma.cc/GUR9-4VGS].

20. François Gemenne et al., *Forced displacement related to the impacts of climate change and disasters*, at 3 (June 2021) (reference paper for the 70th anniversary of the 1951 refugee convention); *Climate Change and Displacement*, MÜN REFUGEE CHALLENGE <https://www.unhcr.org/sites/default/files/legacy-pdf/5df9f01b4.pdf> [https://perma.cc/6LZ7-V4JH]; *Climate Change, Displacement and Human Rights*, U.N.

International Organization for Migration (“IOM”)²¹ have assumed some leadership on the issue in recent years.²² The annual UNFCCC Conference of the Parties (“COP”) negotiations are also relevant to provide support in developing and administering the governance framework.²³

The common thread uniting these definitions is the requirement of leaving one’s home and community because of climate change impacts.²⁴ Given that the U.N. and other international agencies do not recognize a governing definition of climate refugees, the process to establish a definition for those displaced by climate change has been slow and contentious.²⁵ The term “climate refugee” has been used to describe individuals displaced from their homes due to natural disasters and climate change.²⁶ Some definitions include all displaced individuals under this definition, noting that it applies to anyone forced to move due to natural disasters and climate change.²⁷ This may include both internal displacement and transboundary migration, and most agree that climate refugees are those forced to flee due to disasters and other weather events.²⁸

HIGH COMM’R REFUGEES [hereinafter UNHCR] (Mar. 2022), <https://www.unhcr.org/sites/default/files/legacy-pdf/6242ea7c4.pdf> [<https://perma.cc/TW2J-LCWF>]; UNHCR, *Climate Change and Disaster Displacement, An Overview of UNHCR’s Role*, at 5 (2017), <https://www.unhcr.org/sites/default/files/legacy-pdf/5975e6cf7.pdf> [<https://perma.cc/362M-Y6Y8>]; Guy S. Goodwin-Gill & Jane McAdam, *UNHCR and Climate Change, Disasters, and Displacement*, UNHCR, at 10 (2017), <https://www.refworld.org/pdfid/59413c7115.pdf> [<https://perma.cc/QNC2-AEXE>].

21. Walter Kälin & Sanjula Weerasinghe, Int’l Org. for Migration [hereinafter IOM], *Environmental Migrants and Global Governance: Facts, Policies and Practices*, at 1, 7 (2017); Richard E. Bilborrow, IOM, *Collecting Data on the Migration-Environment Nexus*, in MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE, at 117 (Frank Laczko & Christine Agharzam eds., 2009); Oli Brown, IOM *Migration and Climate Change*, at 13–15 (2008); IOM, *IOM Outlook on Migration, Environment and Climate Change*, at 13 (2014); Katy Barwise, Alison Talkers & Elizabeth Linklater, IOM, *Integrating Migration into Environment and Climate Change Interventions*, at 45 (2021); IOM, *IOM Perspectives on Migration, Environment and Climate Change*, at 1–3 (2014); IOM, *Climate Change and Migration in Vulnerable Countries*, at 16 (2019); IOM, *Migration, Climate Change and the Environment*, at 11, 31 (2009); IOM, *People on the Move in a Changing Climate – Linking Policy, Evidence and Action*, at 2–3 (2022); IOM, *Migrants and Migration Policy in the Context of the Adverse Effects of Climate Change and Environmental Degradation*, at 7 (2016).

22. For a discussion of the respective roles of the UNHCR and the IOM in managing climate-displaced peoples, see generally Miriam Cullen, *The IOM as a “UN-Related Organization,” and the Potential Consequences for People Displaced by Climate Change*, in CLIMATE REFUGEES, *supra* note 7, at 338–56; *Climate Change and Disaster Displacement*, *supra* note 20; Avidan Kent & Simon Behrman, *Filling the Institutional Gap*, in FACILITATING THE RESETTLEMENT AND RIGHTS OF CLIMATE REFUGEES: AN ARGUMENT FOR DEVELOPING EXISTING PRINCIPLES AND PRACTICES (2018); Elisa Fornalé & Curtis Doebbler, *UNHCR and Protection and Assistance for the Victims of Climate Change*, 183 GEOGRAPHIC J. 329 (2016).

23. See IOM, *Mapping Human Mobility (Migration, Displacement and Planned Relocation) and Climate Change in International Processes, Policies and Legal Frameworks*, at 36 (2018).

24. See generally *Environmental Refugee*, NAT’L GEOGRAPHIC (July 2023), <https://education.nationalgeographic.org/resource/environmental-refugee/> [<https://perma.cc/YDN7-CXNN>] (last visited May 26, 2024).

25. See generally Alex Randall, *Climate Refugees definition: can we define a climate refugee?*, CLIMATE MIGRATION & COALITION UK, <https://climatemigration.org.uk/climate-refugees-definition> [<https://perma.cc/JZP6-PSVL>] (last visited May 25, 2024).

26. See *What (and Who) Are Climate Refugees?*, INT’L CATHOLIC MIGRATION COMM’N, <https://connect.icmc.net/what-and-who-are-climate-refugees/> [<https://perma.cc/4EJM-UJ6Y>] (last visited Nov. 12, 2023).

27. Joanna Apap, Eur. Parl. Rsch. Serv., *The concept of ‘climate refugee’: towards a possible definition*, at 2 (2018).

28. See generally Tetsuji Ida, *Climate refugees – the world’s forgotten victims*, WORLD ECON. FORUM (June 18, 2021), <https://www.weforum.org/agenda/2021/06/climate-refugees-the-world-s-forgotten-victims> [<https://perma.cc/ZRM3-YMTH>]; see also Randall, *supra* note 25; Yvonne Su, *The One Billion ‘Climate Refugees’ that*

Those who are considered climate refugees live in areas where it would be perilous to continue to live or work there.²⁹ Others view the definition more broadly to include future harms as well, describing climate refugees as those impacted by a disruption in their society that could somehow directly or indirectly relate to short- or long-term change in the environment.³⁰

There has been debate concerning the applicability of the term “refugee” because the UNHCR has defined refugees in the context of persecution rather than natural disasters.³¹ According to the UNHCR, the term “refugees” only consists of persons who flee from one country to another on grounds of “persecution” due to nationality, ethnicity, race, religion, or political ideology.³² This implies that “climate refugee” does not exist in international refugee law, because climate change is not a ground of persecution and because “refugees” under international refugee law are people who move across borders. The UNHCR does not endorse the term “climate refugees” but instead prefers the term “persons displaced in the context of disasters and climate change.”³³ Similarly, the IOM prefers the term “climate migrant” to “climate refugee,” because extending the 1951 Refugee Convention to climate displaced peoples could weaken the protection of refugees that the Convention is designed to protect.³⁴

Given that climate change is likely to create internal movement, the term “climate refugee” can be misleading.³⁵ Some scholars have suggested that those who are forced to move within their country should be referred to as internally displaced persons.³⁶ Moreover, communities forced to migrate due to climate change do not want to be labeled as “refugees.”³⁷ The term “refugee” comes with negative connotations and communities facing climate-related displacement would prefer not to be seen or defined as refugees of any kind.³⁸ For example, the term can evoke sentiments of xenophobia³⁹ and other negative fears related to refugees.⁴⁰ Apart from the potential negative implications of the term, scholars assert that the term “climate refugees” is not the most

Never was: INGOs and the Human Rights Perspective to Climate Change-Induced Displacement, 4 OXFORD MONITOR OF FORCED MIGRATION 17 (2014).

29. Apap, *supra* note 27, at 7.

30. McAllister, *supra* note 14.

31. *Climate Change and Disaster Displacement*, *supra* note 20.

32. *Id.* ¶ 1.

33. *Id.*

34. Dina Ionesco, IOM, *Let's Talk About Climate Migrants, Not Climate Refugees*, <https://rosanjose.iom.int/en/blogs/lets-talk-about-climate-migrants-not-climate-refugees> [https://perma.cc/QHH4-QNXD] (last visited Nov. 12, 2023).

35. *Id.*

36. *See, e.g.*, Su, *supra* note 28, at 19.

37. Ionesco, *supra* note 35.

38. *Id.*

39. *See generally* Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination against Refugees*, 45 GEO. J. INT'L L. 323 (2014).

40. *See generally* Pablo S. Bose, *Welcome and Hope, Fear, and Loathing: The Politics of Refugee Resettlement in Vermont*, 24 PEACE & CONFLICT: J. PEACE PSYCH. 320 (2018). The negative emotional connotation associated with the term “refugees” is beyond the scope of this article. This Article instead focuses on the legal debate regarding the use of this term.

appropriate. McAdam considers it inappropriate because it does not exist in law,⁴¹ whereas Nicholson argues that the scholarly debate on terms concerning climate change related migration has caused a “logical tautology,” which impairs progress in addressing the challenges that the issue presents.⁴²

Some migrant support groups believe the term “climate migrant” is more accurate because, much like internally displaced persons, climate migrants are not recognized as refugees under international refugee law.⁴³ However, the term “migrant” is also debated in this context, as some scholars believe that the term implies volition and the opportunity to return at will, which does not apply to those displaced by climate change.⁴⁴

Some consider “environmental refugees” or “environmental migrants” to be umbrella terms for anyone forced to flee due to natural disasters, whereas the term “climate refugees” describes the subset of refugees who must leave their communities due to the direct effects of climate change.⁴⁵ This distinction enables a broader term like “environmental refugee” to encompass all possible factors contributing to migration (internal or transboundary, sudden or progressive change, voluntary or forced, and temporary or permanent), whereas “climate migrant” offers a narrower definition.⁴⁶

The scholarly debates regarding who is eligible for protection as “climate refugees” generally focus on environmental conditions, sudden-onset disasters, and slow-onset disasters.⁴⁷ Scott acknowledges that climate change, natural

41. Jane McAdam, *Refusing Refuge in the Pacific: Deconstructing Climate-induced Displacement in International Law*, in *MIGRATION AND CLIMATE LAW* 102, 102 (Etienne Pigué & Antoine Pécoud eds. 2011). See also Jane McAdam, *Review Essay: From Economic Refugees to Climate Refugees*, 10 MELB. J. INT'L L. 579, 603 (2009) (noting that “[i]n any event, it is not self-evident that refugee-like protection is the most appropriate response to climate-induced displacement”). See also IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2018) (stating that “[t]here is widespread agreement in the scientific and legal literature that the use of the term climate refugee is scientifically and legally problematic”).

42. Calum TM Nicholson, *Climate Mobility is not a Proper Subject of Research and Governance*, in *CLIMATE MIGRATION* 215, 222 (2021).

43. *What is the 1951 Refugee Convention and Who Does it Protect?*, INT'L CATHOLIC MIGRATION COMMISSION, <https://connect.icmc.net/what-is-the-1951-refugee-convention-and-who-does-it-protect/> [<https://perma.cc/manage/create?folder=3965>] (last visited Nov. 12, 2023).

44. Lea Merone & Peter Tait, *Climate Refugees: Is it Time to Legally Acknowledge those Displaced by Climate Disruption?*, 42 AUSTL. & N.Z. J. PUB. HEALTH 508, 509 (2018).

45. See generally *Environmental Migration*, MIGRATION DATA PORTAL (June 2023), https://www.migrationdataportal.org/themes/environmental_migration_and_statistics [<https://perma.cc/manage/create?folder=3965>]; *Environmental Refugee*, NAT'L GEOGRAPHIC EDUC., <https://education.nationalgeographic.org/resource/environmental-refugee/> [<https://perma.cc/U2WW-R6UP>] (last visited Nov. 12, 2023).

46. *Environmental Migration*, IOM, <https://environmentalmigration.iom.int/environmental-migration> [<https://perma.cc/B4S8-ERNL>] (last visited Nov. 12, 2023).

47. Sumedha Chatterjee, *Climate Refugees: Arriving at a Possible Framework*, in *GLOBAL CLIMATE CHANGE AND ENVIRONMENTAL REFUGEES: NATURE, FRAMEWORK AND LEGALITY* 185, 188 (Pardeep Singh, Bendangwawang Ao & Anamika Yada eds., 2023); Matthew Scott, *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?* 26 INT'L J. REFUGEE L. 404, 404 (2014) (Nov. 12, 2023); Jane McAdam, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement*, 114 AM. J. INT'L L. 708, 711 (2020).

disasters (natural hazards-induced disasters), and displacement are inter-related phenomena.⁴⁸ While establishing a link between climate change and disasters, Scott asserts that “climate change is a risk multiplier” for natural disasters.⁴⁹

The UNFCCC and Paris Agreement do not address the challenge of climate displacement in the language of the agreements.⁵⁰ The 2009 COP 15 in Copenhagen is credited as the starting point for the discussion of climate displacement as a COP agenda item.⁵¹ However, in the COPs that followed until 2022, climate displacement received little attention. The topics most relevant to climate displacement in the COP meetings have been “adaptation” and “loss and damage.” Climate displacement generally was not addressed directly in the COP process “because there is a consistent view that [the] UNFCCC may not be the most appropriate legal institution to specifically address climate displacement due to its lack of enforcement powers.”⁵²

One COP decision, 1/CP.21, adopted by the COP in 2016, addresses recommendations for integrated approaches to “avert, minimize and address displacement related to the adverse impacts of climate change.”⁵³ In this decision, the parties refer to displacement arising out of the adverse impacts of climate change; however, the U.N. system generally recognizes “displacement” as an effect of climate change.⁵⁴ In *Teitiota v. New Zealand*, the Human Rights Committee (“HRC”) also stated that adverse effects of climate change can lead to heightened risk of vulnerability,⁵⁵ consequently leading to displacement. The term “climate refugee” can be tested to determine the paradigm of displacement due to climate change or adverse effects of climate change. The UNFCCC defines adverse effects of climate change as “changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.”⁵⁶

The UNFCCC defines climate change as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”⁵⁷ Reading the definition of “climate change” and “adverse effects of climate change” together, it can be concluded that adverse effects of climate change can generally constitute environmental

48. Scott, *supra* note 47, at 407.

49. *Id.* at 409.

50. STELLINA JOLLY & NAFEEES AHMAD, CLIMATE REFUGEES IN SOUTH ASIA 89 (2019).

51. *Id.* at 92.

52. *Id.* at 97.

53. *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*, at 8, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

54. *Causes and Effects of Climate Change*, U.N. CLIMATE ACTION, <https://www.un.org/en/climate-change/science/causes-effects-climate-change> [<https://perma.cc/WJ7P-6F3E>].

55. Hum. Rts. Comm. [hereinafter HRC], *Teitiota v. New Zealand*, ¶ 9, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019).

56. UNFCCC, *supra* note 19, Art. 1(1).

57. *Id.* Art. 1(2).

degradation and deleterious effects on “natural and managed ecosystems,”⁵⁸ if they result from alteration of the composition of the global atmosphere and natural climate variability observed over comparable time periods. Therefore, the term “climate-related displacement” should be preferred over “climate-induced displacement.”⁵⁹ Even though McAdam and Saul refer to the term climate-related,⁶⁰ the international discourse still appears to focus on the term climate-induced.

In a recent study on climate change and human mobility, Ingrid Boas challenges the narrative of “climate-induced migration,” and recommends an inquisitorial perspective toward the term rather than a submissive perspective that assumes that climate change causes mass migration.⁶¹ Boas et al. also suggest that the term “migration” does not capture the diverse spectrum in which people “do or do not become mobile due to a changing climate” and therefore the attention should shift from “climate migration” to “climate mobilities.”⁶² She asserts that “migration is not solely driven by climate . . . Even when climate change does play a role, it remains difficult to determine the extent of its influence.”⁶³

The ongoing debate concerning the scope and applicability of the term “climate refugees” is the first challenge in seeking to devise legal frameworks to protect these vulnerable populations. In the United States and India, overcoming this definitional quandary will drive both political and societal willingness to protect those displaced due to climate change-related factors, which can include disasters and conflicts. In resolving who is covered by the term “climate refugees,” both nations can benefit from adopting a “climate-related” rather than a “climate-induced” migration discourse.

II. A BRIEF OVERVIEW OF PRACTICES IN INDIA

As one of the top ten largest land masses in the world, India is projected to be among the most desirable countries for climate displaced peoples.⁶⁴ Some scholars propose that buying lands from countries like India, who have more land, can help populations from sinking islands avoid extinction.⁶⁵ An estimated 50 to 120 million people are likely to migrate to India as “climate refugees” and

58. *Id.* Art. 1(1).

59. See Jane McAdam & Ben Saul, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*, at 6 (Sydney Center for International Law Working Paper, Nov. 2008) (stating that “[i]t is assumed here that climate-induced—or more accurately, climate-related—displacement will ordinarily be a product of a complexity of inter-related environmental processes and variable human responses”).

60. *Id.*

61. See Ingrid Boas et al., *Climate Migration Myths*, 9 NAT. CLIMATE CHANGE 901, 902 (2019) (last visited Nov. 12, 2023).

62. *Id.*

63. *Id.*

64. Megha Gautam, *Climate Refugees: A Global Environmental and Legal Crisis*, 18 SUPREMO AMICUS 507, 510 (2020).

65. See, e.g., Jerry I.-H. Hsiao, *Climate Refugee and Disappearing States: in Need for a New Legal Regime?*, 5 CULTURAL & REL. STUD. 268, 273 (2017).

India needs to be prepared for this crisis.⁶⁶ A first step toward a solution is to understand the concept of “climate-refugees”⁶⁷ and conceptualize it in the Indian context. India lacks a domestic framework to protect refugees. Although protection of climate refugees may currently be a far-fetched dream for the Indian regulatory system due to its current overemphasis on neo-liberal notions of self-enterprise,⁶⁸ international and domestic human rights law can offer some protections for those seeking recognition as climate refugees in India.⁶⁹

The dearth of financial resources, the large existing population of India, and the lack of socio-political will to accommodate refugees pose great challenges for India as a destination country for climate refugees.⁷⁰ India does not have comprehensive national legislation concerning refugee protection.⁷¹ The Citizenship Amendment Act of 2019 is one of the rare codified provisions on refugee protection in India,⁷² yet this provision has been criticized for being discriminatory.⁷³ In the absence of a comprehensive legislative framework, the judiciary has stepped in to address legal issues concerning refugees.⁷⁴

Given the lack of statutes governing refugee rights or related administrative processes, the system for refugees is “characterised by an eclectic interplay of administrative ad hocism and judicial assertion of constitutional rights.”⁷⁵ As such, there is no systematic mechanism in place for those seeking refugee status in India, and the administrative decisions are largely political.⁷⁶ There are no UNHCR registration offices for asylum seekers at the borders of India, requiring such applicants to travel to the only office in New Delhi to

66. Nagesh H. Sawant & Aparna Sanjeev, *Climate Refugees in India: A Wake-up Call for an Inclusive Policy*, 78 INDIA Q.: J. INT'L AFF. 371, 371 (2022).

67. See generally McAdam, *supra* note 47.

68. Jessica Field, Anubhav Dutt Tiwari & Yamini Mookherjee, *Self-reliance as a Concept and a Spatial Practice for Urban Refugees: Reflections from Delhi, India*, 33 J. REFUGEE STUD. 167, 169 (2020). See generally Abhinav Mehrotra & Chhaya Bhardwaj, *Need for a National Legislation on Refugees in India*, 78 INDIA Q. 297 (2022).

69. Mehrotra & Bhardwaj, *supra* note 68, at 301.

70. *Id.*

71. Fazal Abdali, *A Comparative Analysis of the Global Compact on Refugees and the Constitution of India*, in THE GLOBAL COMPACT ON REFUGEES: INDIAN PERSPECTIVES AND EXPERIENCES 108, 108–09 (Jessica Field & Srinivas Burra eds., 2020) (noting that India has “no domestic law relating to asylum” and while the Constitution of India “extends protection and rights to refugees and asylum seekers on a case-by-case basis, there is no systematised approach that guarantees refugees and asylum seekers security within the country”).

72. See generally Mehrotra & Bhardwaj, *supra* note 68; James Ellsmoor & Zachary Rosen, *Kiribati's Land Purchase in Fiji: Does it Make Sense?*, DEVPOLICYBLOG (Apr. 10, 2024), <https://devpolicy.org/kitibatis-land-purchase-in-fiji-does-it-make-sense-20160111/> [<https://perma.cc/Z2MP-86Q8>].

73. See generally Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act*, 4 INDIAN L. REV. 138 (2020); M. Mohsin Alam Bhat, *The Constitutional Case against the Citizenship Amendment Bill*, 54 ECON. & POL. WKLY. 3 (2019); Aadil Ahmed Shairgojri & Showkat Ahmad Dar, *Voices from India's Borderlands against the Citizenship Amendment Act (CAA-2019) An Explanatory Study*, 2 J. LANG. & LING. SOC'Y 24. But see generally Keshab Chandra Ratha, *Interpreting Citizenship Amendment Act: Its Content and Context*, 67 INDIAN J. PUB. ADMIN. 559 (2021) (arguing that the Act is not discriminatory).

74. See generally Rongeeet Poddar, *The Question of Climate Refugees: Does India Need a Legal Framework?*, LAW SCHL. POL'Y REV. & KAUTILYA SOC'Y (July 28, 2019), <https://lawschoolpolicyreview.com/2019/07/28/the-question-of-climate-refugees-does-india-need-a-legal-framework/> [<https://perma.cc/CNM5-WPK7>].

75. Saurabh Bhattacharjee, *India Needs a Refugee Law*, 43 ECON. & POL. WKLY. 71, 73 (2008).

76. *Id.*

understand the process and how they can claim refugee protection.⁷⁷ Moreover, the Ministry of Home Affairs (“MHA”) does not disclose the process that applies to the asylum seeker,⁷⁸ underscoring the high level of discretion. UNHCR exercises registration and determination of refugees in India, but its mandate is limited to refugees who are not nationals of Sri Lanka, Tibet, Pakistan, and Bangladesh, and depends on the “political will” of the government.⁷⁹ Additionally, the relationship between UNHCR and Indian government has still not been formalized.⁸⁰ As of this writing, Indian’s refugee framework is a mix of judicial decisions and fragmented legislation with no uniform administrative rules, governed by the MHA’s discretionary administrative processes.

The existing refugee framework in India is based on a range of disparate laws and a “human-rights based approach”⁸¹ adopted by the judiciary under the Indian Constitution. The national legislation that applies in cases of all non-citizens (immigrants, refugees and asylum seekers) in India includes the Foreigners Act of 1946, which confers powers on the Central Government with respect to foreigners.⁸² The Registration of Foreigners Act of 1939 includes rules for registration of foreigners in India.⁸³ The Citizenship Amendment Act 2019 (“CAA”),⁸⁴ which governs citizenship, establishes that Indian citizenship will be provided to persecuted minorities who are Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Afghanistan, Bangladesh and Pakistan, and who entered India on or before December 31, 2014.⁸⁵ Additionally they will not be treated as illegal immigrants.⁸⁶ This Act for the first time creates a legal category for people who can be considered refugees in India.⁸⁷ Existing law authorizes long-term visas for members of certain categories of minorities and women from Pakistan, Bangladesh, and Afghanistan nationals coming to India on “valid documents.”⁸⁸ These acts only include these substantive protections and do not contain guidelines to implement these rules.

In addition to the fragmented laws above, the judicial interpretation of the Constitutionally guaranteed “right to life” of all citizens and aliens is another

77. Roshni Shanker & Hamsa Vijayaraghavan, *Refugee Recognition Challenges in India*, 65 FORCED MIGRATION REV. 24, 24 (2020).

78. *Id.*

79. A. Alexander & N. Singh, *India and Refugee Law: Gauging India’s Position on Afghan Refugees*, 11 LAWS 31, 31, 35 (2022).

80. *Id.*

81. Varun Gauri & Siri Gloppen, *Human Rights Based Approaches to Development: Concepts, Evidence, and Policy*, 44 POLITY 485, 497 (2012).

82. Act No. 31 of 1946, Pmbl. (India).

83. Act No. 16 of 1939 (India).

84. Act No. 47 of 2019 (India).

85. *Id.*

86. *Id.*

87. *Id.* ¶ 2. India issues long-term visas as the legislative basis to build upon a practice to protect refugees or give refugee status to migrants from other countries. While it had some system in place, it lacks a framework to protect refugees consistently through law; hence the UNHCR recommended that it “classify refugees and asylum-seekers as a special category of foreigners.” UNHCR, *Submission by the UNHCR for the OHCHR’s Compilation Report, Universal Periodic Review: 4th Cycle, 41st Session*, at 1, 4 (Feb. 2022).

88. Long Term Visas, Regulation No. 25022/62/2020-F-I, ¶ 4 (Aug. 13, 2020).

basis for potential protection of refugees in India. The Supreme Court of India has adopted this rights-based approach to protect non-citizens and refugees.⁸⁹ Historical practice in India includes protecting refugees from neighboring countries like Tibet, Sri Lanka, and Afghanistan, and sometimes denying them under the rights-based approach.⁹⁰ The right to equality in Article 14 and the right to life in Article 21 ensure that noncitizens are protected from removal,⁹¹ as long as the non-citizens have a valid visa,⁹² have not committed any minor or major offense,⁹³ and are not a threat to national security.⁹⁴

In March 2024, in *M K Ranjitsinh v. Union of India*, the Supreme Court of India held that “people have a right against the adverse effects of climate change,” under Articles 21 (right to life) and 14 (right to equality).⁹⁵ The decision also clarifies that “while giving effect to this right, courts must be alive to other rights of affected communities such as the right against displacement and allied rights.”⁹⁶ Additionally, the Court also advised that “[d]ifferent constitutional rights must be carefully considered before a decision is reached in a particular case.”⁹⁷ Previously, courts in India recognized that the “right to life” protection also includes protection from cataclysm, catastrophe, and disasters.⁹⁸

89. See generally *Nar’l Hum. Rts. Comm’n v. State of Arunachal Pradesh*, (1996) 1 SCC 742 [hereinafter *NHRC v. Arunachal Pradesh*]; *Anwar v. State of Jammu and Kashmir*, (1971) 3 SCC 104; *Luis De Raedt v. Union of India*, (1991) 3 SCC 554; *Khudiram Chakma v. State of Arunachal Pradesh*, (1994) Supp (1) SCC 615; *Ktaer Abbas Habib Al Qutaifi v. Union of India*, (1999) Cri LJ 919; *Premanand v. State of Kerala*, (2013) 3 KLJ 543.

90. See, e.g., *NHRC v. Arunachal Pradesh*, 1 SCC ¶¶ 1–3 (alleging violations of human rights); *De Raedt v. Union of India*, 3 SCC ¶ 4.

91. *NHRC v. Arunachal Pradesh*, 1 SCC ¶¶ 16–18 (holding that foreigners have the right to life and protection from attempts to uproot them by force).

92. *Hasan Ali Raihany v. Union of India*, SCI, W.P. (C) 17/2006, at 1. The petitioner entered India on a Single Entry Permit, which was valid for six months, after being deported earlier.

93. *Hans Muller of Nurenburg v. Superintendent, Presidency Jail*, (1955) SCR (1) 1284. (“How far it is necessary to take this step in a given case is a matter that must be left to the discretion of the Government concerned, but, in any event, when criminal charges for offences said to have been committed in this country and abroad are levelled against a person, an apprehension that he is likely to disappear and evade an order of expulsion cannot be called either unfounded or unreasonable. . . . The Foreigners Act is not directly concerned with criminals or crime though the fact that a foreigner has committed offences, or is suspected of that, may be a good ground for regarding him as undesirable.”)

94. *Mohammad Salimullah v. Union of India*, SCI, Interlocutory Application No. 38408 (2021) in W.P. (C) 793/2017, ¶ 10. The government submitted that there were serious concerns about the fact that petitioner may pose danger to the internal security of India, which was the basis on which the court allowed deportation of the petitioner. *Id.* ¶¶ 14–15.

95. *M K Ranjitsinh v. Union of India*, (2024) INSC 280, ¶ 24. The Court uses the phrase “people of India” in the context of the right to be free from the adverse effects of climate change. *Id.* ¶ 19. The Court states that “the people have a right against the adverse effects of climate change.” *Id.* ¶ 24. The Court uses international human rights treaty language to state that “States owe a duty of care to citizens to prevent harm and to ensure overall well-being. . . . States are compelled to take effective measures to mitigate climate change and ensure that all individuals have the necessary capacity to adapt to the climate crisis.” *Id.* ¶ 29. The language of people, citizens, and all individuals is crucial to understand the application of this right and to question whether this right applies to citizens and non-citizens equally. While the decision itself does not offer clarity on this question, the assertion that other rights and interpretations of fundamental rights in India should be applied when determining the outcomes in a particular case offers hope that this right can also be applied to climate refugees in the future.

96. *Id.* ¶ 27.

97. *Id.*

98. *Purushaindra Kumar Kaurav v. Union of India*, (2006) AIR 2004, ¶ 17.

In *Arvind Kumar v. the Union of India*,⁹⁹ the High Court of Patna in India confirmed that disasters like flooding impede the right to life of citizens under Article 21.¹⁰⁰ The Court referenced *Olga Tellis v. Patna High Court*¹⁰¹ and ruled that “flooding obstructs the right to livelihood and the right to work under Article 41 of the Constitution of India.”¹⁰² In *Sushil Ratnakar Nimbalkar v. State of Maharashtra*,¹⁰³ the Bombay High Court acknowledged that flooding not only claims many lives but also damages properties and livelihoods of people affected by flooding.¹⁰⁴ The petitioner also argued that “floods have now posed the danger of epidemics like gastroenteritis and have affected the basic hygiene of the people with sewage water getting mixed with drinking water and other offshoots.”¹⁰⁵

Deportation of illegal immigrants in India is processed under the subordinate legislations framed by the Central Government of India.¹⁰⁶ When hearing an alleged refugee and deportation case, the judiciary has also adhered to international standards by postponing deportation of refugees until the court renders its final decision on the pending hearing.¹⁰⁷ In practice, some refugee communities in India have generally been living peacefully. For example, the Tibetan refugees in India have found a safe space to protect and practice their culture.¹⁰⁸ However, other communities have not found comparable solace. Despite official government reports claiming that Rohingya who live in India “are not being discriminated against,”¹⁰⁹ the overall policy of the Indian government often leads to decisions to deport them.¹¹⁰ Overall, the refugee protection framework in India is a mix of fragmented laws and judicial decisions that lack cohesion. As such, refugees typically suffer from desperate experiences in seeking protection.

A similar mix of legislation and judicial decisions are also at play in the context of climate refugees in India. There is no national climate-related refugee legislation in India;¹¹¹ however, the laws and rules from the sources discussed

99. (2022) Patna SC, CWJC 4176/2022.

100. *Id.* ¶ 27.

101. *Id.* citing *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

102. *Id.* ¶ 27.

103. *Sushil Ratnakar Nimbalkar v. State of Maharashtra*, (2020) Bombay HC, W.P. (C) 3543, ¶ 18.

104. *See id.* ¶ 18.

105. *Id.* ¶ 10.

106. *Mohammad Tahir v. State of Telangana*, (2022) Telangana HC, W.P. 6407 et al., ¶ 20, citing *Momin Momimwar Hussain v. State Representation By the Principal Secretary*, (2019) Madras HC, W.P. 1141/2019, ¶ 13 (noting how Section 3 of the Foreigner's Act enables “the Central Government to frame subordinate legislation in the shape of statutory orders which could be general or particular in nature and may be in respect of foreigners or in respect of any individual foreigner,” which underscores the discretionary nature of the regulation of refugees or foreigners on long-term visas in India).

107. *Abdur Sukur v. State of West Bengal*, (2019) Calcutta HC, W.P. 23644(W)/2019, at 2.

108. Franz Michael, *Survival of a Culture: Tibetan Refugees in India*, 25 *ASIAN SURVEY* 737, 738 (1986).

109. *Jaffar Ullah v. Union of India*, (2018) W.P. (C) 859/2013, ¶ 5.

110. Qadri Inzamam & Haziq Qadri, *India Abandons the Rohingyas*, *FOREIGN POL'Y* (Apr. 29, 2022), <https://foreignpolicy.com/2022/04/29/india-rohingya-refugees-myanmar-deportation/> [https://perma.cc/3VNP-PD4G].

111. Mehrotra & Bhardwaj, *supra* note 68, at 298.

above can apply to the issues at hand. Previous attempts to submit climate change bills were not successful.¹¹² In 2022, The Climate Migrants (Protection and Rehabilitation) Bill was also introduced as a Private Members’ bill¹¹³ in India.¹¹⁴ This bill, however, only aims to “establish an appropriate policy framework for the protection and rehabilitation of internally displaced climate migrants and for all matters connected therewith.”¹¹⁵ The bill does not consider the cross-border migration associated with climate change.

The combination of the existing Indian refugee framework under the Citizenship Amendment Act of 2019 (“CAA”) and “right to life” framework under the Constitution of India¹¹⁶ can be applied to “climate refugees” from Bangladesh. Climate change is one of the leading causes of migration from Bangladesh to India, underscoring India as a destination country for Bangladeshi displaced peoples.¹¹⁷ Bangladesh is covered under the existing refugee law protection scheme; however, it only extends to Bangladeshis who are Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians, and excludes people of other religions, particularly Muslim migrants and asylum seekers. The CAA is limited to certain countries and women in certain situations because it includes Bangladesh as one of the countries, and only extends refugee protection for “cases involving extreme compassion.”¹¹⁸ Although this phrase has not been defined or used in India to protect climate refugees or environmental migrants to date, it could be used to protect minorities and women in certain situations from Bangladesh when affected by climate-related events.

Under Article 21 of the Constitution of India, the right to life includes protection from disasters that may be climate-related or related to natural hazards.¹¹⁹ This rights-based approach under the Indian Constitution can be used to conceptualize climate refugees in India. Article 21 applies to aliens (non-citizens) and citizens equally.¹²⁰ The refugee law principle of nonrefoulement is also guaranteed to non-citizens under Article 21 and deportation can only be conducted under the procedure established by law.¹²¹ The effect of the

112. The Climate Change Bill, Bill No. 23 of 2015 (Nov. 27, 2014).

113. A Private Members’ bill is a “legislative proposal that is initiated by an individual member of the parliament, who is not a minister.” Rajya Sabha Secretariat, *Private Members’ Legislation*, Preface (June 2023).

114. The Climate Migrants (Protection and Rehabilitation) Bill, Bill No. 160 of 2022 (2022).

115. *Id.* at 1.

116. Mehrotra & Bhardwaj, *supra* note 68, at 309.

117. See generally Nisha Thankappan, *Reducing the Risks of Transboundary Climate Change Impacts in India and Bangladesh: Options for Cooperation*, in RISK, UNCERTAINTY, AND MALADAPTATION TO CLIMATE CHANGE: POLICY, PRACTICE AND CASE STUDIES 73–91 (Anindita Sarkar et al. eds., 2024); Dhanasree Jayaram, *Shifting discourses of climate security in India: domestic and international dimensions*, THIRD WORLD Q. 1 (2024).

118. Long Term Visas Regulation, *supra* note 88, ¶ 1(A)(iv).

119. Stellina Jolly & Chhaya Bhardwaj, *Exploring the Role of the National Human Rights Commissions in Climate-Induced Disaster Displacement in India: Lessons from Sri Lanka and the Philippines*, 5 YB. INT’L DISASTER L. ONLINE 163, 172–76 (2024).

120. State Trading Corp. of India Ltd. & Ors. v. Commercial Tax Officer, Visakhapatnam & Ors., (1963) AIR 1811, at 7.

121. Mike Sanderson, *The Role of International Law in Defining the Protection of Refugees in India*, 33 WIS. INT’L L.J. 46, 51 (2015). In *Ktaer Abbas Habib v. Union of India*, the Gujarat High Court stated that,

combination and application of this jurisprudence can lead to protection of non-citizens as “climate refugees” in India.

Article 21 also guarantees the “right to healthy environment.”¹²² The term “environment” is further defined under the Environment Protection Act 1986.¹²³ According to the Act, the term “environment” includes water, air and land, as well as their relationship with human beings, other living creatures, plants, micro-organisms, and property.¹²⁴ The term “climate change” is discussed as a phenomenon under international law¹²⁵ and is not defined under Indian domestic law. However, the UNFCCC defines the term “climate systems” as the totality of the atmosphere, hydrosphere, biosphere, and geosphere and their interactions.¹²⁶ In comparing the definitions of “environment” in Indian law, and “climate system” under international law, the two are foundationally similar. But whereas the Indian government has a duty to protect the right to environment of its citizens under a broader umbrella of right to life, whether this can be applied to non-citizens remains to be tested.

III. THE U.S. APPROACH TO “CLIMATE REFUGEES”

The U.S. response to climate refugees is woefully underdeveloped. Perhaps the best example of U.S. inaction on this issue is that nearly two decades after the *Native Village of Kivalina v. ExxonMobil*¹²⁷ case involving the imminent climate displacement of Native Alaskans, the U.S. government has done virtually nothing to address this looming climate displacement crisis for Indigenous and other vulnerable communities throughout the nation. In *Kivalina*, a federally recognized Native Alaskan village sued twenty-two of the leading multinational oil and gas companies. Based on these companies’ significant contribution to global climate change, the complaint sought USD \$400 million in damages to relocate the village of approximately four hundred Native Alaskans ten miles inland from their precarious existing location that

“Article 21 of the Constitution of India guarantees right of life on Indian Soil to a non-citizen, as well, but not right to reside and settle in India.” (1999) Cri LJ ¶¶ 9–11, citing NHRC v. Arunachal Pradesh.

122. The Indian judiciary was overwhelmed with right to life and environmental protection or environmental disaster cases after the 1984 Bhopal Gas Tragedy, the 1985 Oleum Gas Leak, and the hazards of modern industries in India. The idea was to empower citizens to approach the constitutional courts under Article 21 combined with Article 32 of the Constitution under their right to a healthy environment. The jurisprudence supported approaching the courts for action in several cases: Subhash Kumar v. State of Bihar, (1991) 1 SCC 598, ¶ 7 (holding that Article 21 includes the right to enjoy pollution-free water and air); MC Mehta v. Union of India, (1987) 1 SCC 395, ¶¶ 30–31 (“Oleum Leak Case”) (refraining from deciding the question of whether to enforce Article 21 against a private corporation engaged in hazardous industrial activities, but emphasizing that there may be liability in tort); and MC Mehta (Taj Trapezium Matter) v. Union of India, (1997) 2 SCC 353 ¶ 13 (holding that the precautionary principle and the polluter pays principle are the “law of the land” in a case seeking to protect the Taj Mahal from decay).

123. The Environment Protection Act, 1986, § 2 (a).

124. *Id.*

125. UNFCCC, *supra* note 19, Art. 1(2)

126. *Id.* Art. 1(3).

127. 696 F.3d 849 (9th Cir. 2012), *cert denied*, 568 U.S. 2000 (2013).

was vulnerable to inundation from coastal erosion from rising sea levels.¹²⁸ The United States Court of Appeals for the Ninth Circuit upheld the district court’s dismissal of the case on standing and jurisdiction grounds, noting that the case constituted a nonjusticiable political question.¹²⁹

Further, a recent petition to the Inter-American Commission on Human Rights filed by Indigenous communities in the United States seeks to hold the federal government accountable for this inaction and require it to implement climate displacement policy, funding, and assistance for these vulnerable communities.¹³⁰ Nevertheless, existing tools under U.S. immigration law, asylum law, and disaster law could be leveraged to provide more effective protection. In addition, the Biden administration has started to consider the challenge and imminence of climate migration and is seeking to implement some responses.

In October 2021, the Biden administration released a report discussing the links between climate change and migration.¹³¹ This report highlights the different factors related to climate migration, such as how existing programs can reduce the risk of forced migration and the protection of displaced individuals.¹³² It also lists a variety of strategies to effectively address climate migration, including providing resources to displaced individuals and the need for foreign assistance through both financial contributions and policy-making cooperation.¹³³ This report is the first recognition of the link between climate change and migration by any U.S. administration¹³⁴ and has been described as “groundbreaking” and a “landmark” by analysts.¹³⁵ The report uses the term “climate-related migration,” which suggests that politically and scientifically accepted science in the United States that prompts migration may occur in some situations due to “climate-related” events, as opposed to “climate-induced” migration. The term “climate-related,” as compared to “climate-induced,” broadens the scope of protection for communities vulnerable to climate displacement.

128. *Id.* at 853–54.

129. *Id.* at 853.

130. See *Amid Human Rights Crisis, Indigenous Communities Demand Protections*, EARTH RTS. INT’L (Oct. 28, 2022), https://earthrights.org/media_release/amid-human-rights-crisis-indigenous-communities-demand-protections/ [<https://perma.cc/HF6P-CHBL>].

131. The White House, *Report on the Impact of Climate Change on Migration* (Oct. 2021) [hereinafter White House Report], <https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf> [<https://perma.cc/4F9T-QUYT>].

132. *Id.* at 12.

133. *Id.* at 13.

134. Erol Yayboke, Catherine Nzuki & Sierra Ballard, *The White House Report on Climate Migration, Explained*, CTR. FOR STRATEGIC & INT’L STUD. (Nov. 5, 2021), <https://csis.org/analysis/white-house-report-climate-migration-explained> [<https://perma.cc/R9K6-ZCFP>].

135. Mara A. Mahmud, *Climate Migration and the Future of Immigration Policy in the United States*, CTR. FOR MIGRATION STUD. (Dec. 15, 2022), <https://cmsny.org/us-climate-migration-mahmud-121522/> [<https://perma.cc/NMH2-Z4WM>]; Ben Geman, Zachary Basu & Andrew Freedman, *White House Unveils Landmark Reports on Climate Links to Security Migration*, AXIOS (Oct. 21, 2021), <https://www.axios.com/2021/10/21/climate-change-migration-national-security> [<https://perma.cc/G4KP-3B2W>].

The report calls for the establishment of an interagency policy on climate change and migration.¹³⁶ The report acknowledges the substantial gaps in protecting internally displaced individuals and references the U.N. Guiding Principles on Internal Displacement to identify their rights and guarantees.¹³⁷ The United States supports the “adoption and implementation of national action plans and national legislation to protect and assist” internally displaced individuals but has not established guidelines or legal standards on how or when that will be achieved.¹³⁸ The report also discusses new policies and pathways for protecting climate migrants, such as the creation of a “private sponsorship program for refugees” that would list criteria for refugees seeking protection.¹³⁹

The report also discusses the use of established migrant protections, such as Temporary Protected Status (“TPS”).¹⁴⁰ It provides that those seeking TPS qualify for protection if fleeing environmental disaster, which underscores the relationship between climate change and immigration law.¹⁴¹ TPS is a type of humanitarian relief for foreign nationals within the United States “who may not qualify for asylum but are nonetheless fleeing—or reluctant to return to potentially dangerous situations.”¹⁴² Established by Title III of the Immigration Act of 1990,¹⁴³ it authorizes the Secretary of the Department of Homeland Security (“DHS”), in consultation with other government agencies, to designate a country for TPS under one or more of the following conditions: “(1) ongoing armed conflict in a foreign state that poses a serious threat to personal safety; (2) a foreign state request for TPS because it temporarily cannot handle the return of its nationals due to an environmental disaster; or (3) extraordinary and temporary conditions in a foreign state that prevent its nationals from safely returning.”¹⁴⁴ Currently, TPS protects immigrants from Nicaragua and Honduras due to flooding, and from Haiti, Nepal, and El Salvador due to earthquakes.¹⁴⁵ It is unclear why these countries were designated TPS whereas others with similar circumstances were not.¹⁴⁶ While TPS is an existing protection that may be applied to climate migrants, its protection is limited based on its statutory requirements.¹⁴⁷

Given that foreign governments must request TPS designations in cases of environmental disaster, this requirement may adversely impact refugees from countries where the government has less capacity to request TPS for its

136. White House Report, *supra* note 131, at 30–31.

137. *Id.* at 20.

138. *Id.*

139. *Id.* at 21.

140. *Id.* at 18.

141. *Id.*

142. Jill Wilson, Cong. Rsch. Serv., *Temporary Protected Status and Deferred Enforcement Departure*, at 2 (2023).

143. Pub. L. 101-649.

144. Wilson, *supra* note 142, at 2.

145. *Temporary Protected Status*, U.S. CITIZEN. & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/temporary-protected-status> [https://perma.cc/CY3M-RKSH] (last visited May 18, 2024).

146. White House Report, *supra* note 131, at 19.

147. *Id.*

citizens.¹⁴⁸ Moreover, TPS does not apply to refugees who arrive in the United States after a specified date of environmental disaster, which further restricts protection for individuals who may otherwise qualify.¹⁴⁹ The report also notes that TPS is a temporary status and cannot be a permanent solution for individuals unable to return to their home country because of the long-term impacts of climate change.¹⁵⁰ Finally, the report also emphasizes that a large portion of climate-induced migration occurs within borders, making existing migrant protections, such as TPS, inapplicable.

Notwithstanding its value as a first step, the report has been criticized for not providing actionable next steps.¹⁵¹ Without specific policy goals, the report merely acknowledges the gaps in the policy framework without providing concrete recommendations on how to remedy them.¹⁵² Moreover, the report’s heavy reliance on expanding TPS has sparked debate, given that in its thirty years of existence, TPS has only been granted to about twenty countries.¹⁵³ One proposed solution could be to expand the program, but the program does not provide a permanent solution by design.

Another gap in the U.S. framework on climate refugees is the Federal Emergency Management Agency (“FEMA”)’s lack of authority to act before disaster strikes to assist communities in avoiding slow-onset yet imminent harm. FEMA’s authorization is to respond to disasters after they occur, which offers limited protection to communities affected by slow-onset climate-related threats like excessive heat, drought, and vulnerability to wildfires and sea level rise.¹⁵⁴ To be effective, expanding FEMA’s authority requires an accompanying restriction of private property rights if property owners resist moving when their properties have been declared unsafe due to climate change-related threats. This situation resembles previous resistance to the Department of Homeland Security’s authority to encroach on individual liberties¹⁵⁵ and,

148. *Id.*

149. *Id.*

150. *Id.*

151. See Mahmud, *supra* note 135; see also Julie Watson, *After raising hope, Biden still lacks climate migration plan*, ASSOC. PRESS (Oct. 19, 2022, 11:10 AM), <https://apnews.com/article/biden-science-national-security-droughts-climate-and-environment-a168993c37a8be94767799cdfb63ea64> [<https://perma.cc/FXX7-KJPN>]; María Paula Rubiano & Adam Mahoney, *‘Disappointing’: The U.S.’s first climate migration report falls flat*, GRIST (Oct. 25, 2021), <https://grist.org/climate/disappointing-the-uss-first-climate-migration-report-falls-flat/> [<https://perma.cc/T6DC-KK9C>].

152. Rubiano & Mahoney, *supra* note 151.

153. *Id.*

154. FEMA’s mandate is rooted in the Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”), which includes a list of criteria for an event to be eligible for assistance. 42 U.S.C. § 5133. Slow-onset phenomena, such as climate-induced migration, are not included in FEMA’s regulations. See generally Cong. Rsch. Serv., *Climate Change, Slow-Onset Disasters, and the Federal Emergency Management Agency* (Dec. 1, 2022).

155. See Alexander Siedschlag, *Ethical, Legal, and Social Issues In Homeland Security – What They are and How to Address Them*, in FOUNDATIONS OF HOMELAND SECURITY 29, 31 (Martin J. Alperen ed., 2017) (noting the criticism of homeland security efforts as “encroaching of constitutionally protected citizen rights and freedoms without a proportional security payoff, thus not serving the security of the people but infringing liberty”).

during the COVID-19 pandemic, governments' and private entities' public health-based mandates to require individuals to be vaccinated.¹⁵⁶

Critics also noted the report's insistence that the United States has no legal obligation to support climate migrants, despite also acknowledging that the country is the largest greenhouse gas emitter in history.¹⁵⁷ The report briefly alludes to alternative pathways employed in other countries, such as humanitarian visas, but fails to call for similar measures in the United States.¹⁵⁸ While many praise the report for acknowledging the relationship between climate change and migration while highlighting gaps in the policy framework,¹⁵⁹ others argue that the report is a "repetition of what's already known."¹⁶⁰ Moving forward, many urge the United States to take more concrete action to support climate refugees by establishing more legal pathways for protections, creating explicit definitions of who qualifies for protection, and encouraging cooperation between other countries and organizations to establish better protection measures.¹⁶¹

IV. RECOMMENDATIONS FOR REFORM

Progress in protecting climate displaced peoples likely will depend on effective domestic regimes in major destination countries like the United States and India. Relying on existing international law has several limitations. McAdam asserts that "the Refugee Convention will be of limited utility in situations of disaster displacement" and climate change.¹⁶² Other scholars have proposed a new treaty for the protection of climate-related displacement and migration.¹⁶³ While such a proposal offers some benefit, including the opportunity to integrate international environmental law, international human rights law, and international humanitarian law under one umbrella,¹⁶⁴ the idea has been criticized for being too costly and time consuming, unlikely to secure necessary political consensus, and difficult to enforce.¹⁶⁵ Moreover, Scott and McAdam

156. See generally World Health Organization, *COVID-19 and mandatory vaccination: Ethical considerations* (May 30, 2022) (discussing "important ethical considerations that should be explicitly evaluated and discussed through ethical analysis by governments and/or institutional policy makers who may be considering mandates for COVID-19 vaccination").

157. Umair Irfan, *Why the US bears the most responsibility for climate change, in one chart*, VOX (Dec. 4, 2019), <https://www.vox.com/energy-and-environment/2019/4/24/18512804/climate-change-united-states-china-emissions> [<https://perma.cc/KA89-URAQ>]; White House Report, *supra* note 131, at 19.

158. White House Report, *supra* note 131, at 21.

159. Mahmud, *supra* note 135.

160. *Id.*

161. *Id.*

162. Jane McAdam, *Displacement in the Context of Climate Change and Disasters*, in THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 832, 836 (Cathryn Costello, Michelle Foster & Jane McAdam eds., 2021).

163. See, e.g., Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENV'T L. REV. 349, 397–402 (2009).

164. MOSTAFA M. NASER, THE EMERGING GLOBAL CONSENSUS ON CLIMATE CHANGE AND HUMAN MOBILITY 27 (2021).

165. *Id.* at 27–28 (internal citations omitted).

agree that only a small percentage of those affected due to climate change and environmental conditions will migrate internationally.¹⁶⁶ The issue of displacement due to climate change and environmental factors largely remains an issue of internal migration.¹⁶⁷ For all of these reasons, effective domestic law protections offer the potential to be more potent in securing enforceable protection of climate displaced peoples.¹⁶⁸

A. *Examples of Domestic Legislative Protections*

The United States and India share a critical governance gap in the protection of climate refugees in that each country lacks a framework to protect internally displaced peoples. Each country could benefit from borrowing aspects of legislative frameworks proposed in Finland, Sweden, and Germany.

Finland and Sweden enacted laws to protect people fleeing their country of origin due to environmental factors.¹⁶⁹ Some scholars consider Finland's and Sweden's laws as “an alternative source of international protection for people who do not satisfy the requirements for recognition as a refugee.”¹⁷⁰ They provided statutory protections for people displaced across borders due to environmental disasters¹⁷¹ until repealed.¹⁷² The two countries repealed these laws to prevent excess migrants from relocating to their nations,¹⁷³ especially after 2015 European Refugee Crisis.¹⁷⁴ Regardless of their repeal, however, Scott and Garner acknowledge these domestic laws as progressive interpretations of refugee law that offer significant potential for modeling and norm creation in other countries.¹⁷⁵

In addition to the examples from Finland and Sweden, Germany is also exploring domestic frameworks to provide climate passports to people from

166. Scott, *supra* note 47, at 409; McAdam, *supra* note 162, at 834.

167. *Id.* at 409.

168. Notwithstanding the important role that domestic measures in destination countries can and should play, McAdam recognizes that regional refugee conventions also may be well suited to protect people from disasters, but remain to be tested. McAdam, *supra* note 162, at 834–37. Tamara Wood also concludes that regional definitions for refugee protection are more expansive and “better suited” to protect people who flee climate change. Tamara Wood, *The International and Regional Refugee Definitions Compared*, in *THE OXFORD HANDBOOK*, *supra* note 162, at 625, 637.

169. *The Invisible Climate Refugees*, U.N. REG. INFO. CTR. FOR WESTERN EUR. (Dec. 2, 2013), <https://reliefweb.int/report/world/invisible-climate-refugees> [<https://perma.cc/M3YB-8RPR>].

170. Matthew Scott & Russell Garner, *Nordic Norms, Natural Disaster, and International Protection*, 91 *NORDIC J. INT'L L.* 101, 106 (2022).

171. Emily Hush, *Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden*, *COLUM. J. EUR. L. ONLINE* (Sept. 7, 2017), <https://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/> [<https://perma.cc/X77K-KDFG>].

172. Scott & Garner, *supra* note 170, at 106.

173. Hush, *supra* note 171.

174. William Spindler, 2015: *The year of Europe's refugee crisis*, UNHCR (Dec. 8, 2015), <https://www.unhcr.org/us/news/stories/2015-year-europes-refugee-crisis> [<https://reliefweb.int/report/world/invisible-climate-refugees>].

175. Scott & Garner, *supra* note 170, at 103.

island countries to ensure their protection.¹⁷⁶ Germany has debated issuing “climate passports” to people at risk of forced migration due to climate change and whether this passport will give people “citizenship-like rights.”¹⁷⁷ The most recent discussions have been about creating a policy concerning a “climate card,” “climate passport,” or “climate visa” for people in different situations.¹⁷⁸ While the U.S. government has expressed interest in developing legal frameworks domestically to protect people fleeing from environmental stressors in their country of origin, the language of the repealed Swedish Aliens Act¹⁷⁹ and Finnish Aliens Act¹⁸⁰ can be very useful. Both these acts can help determine who is eligible for protection as a climate refugee and what rules will govern such protection. Even for India, both Sweden’s and Finland’s legislative framework could be used as models for domestic legislations of “climate refugees.”¹⁸¹

B. Lessons from International Human Rights Law

International human rights law also may offer protections for climate displaced persons. Jane McAdam compares the adverse effects of climate change to the adverse effects of disasters to consider whether principles of refugee law and human rights law can be used to protect such people.¹⁸² She uses the case of Ioane Teitiota who claimed protection under refugee and human rights law because his life in his country of origin—Kiribati—was “becoming increasingly precarious as a result of insufficient fresh water, overcrowding, inundation, erosion and land disputes, owing to the effects of climate change and sea-level rise.”¹⁸³ The decision of the Human Rights Committee (“HRC”) in *Teitiota v. New Zealand* opened pathways for future claims as a climate refugee, but did not define who can be covered within the concept of climate refugees.¹⁸⁴

176. Hannah Tyler, *Climate Migration: The State of Play on National, International, and Local Response Frameworks*, IDEAS, ACTIONS, RESULTS, at 6 (Mar. 2022).

177. Sarah Louise Nash, *The Perfect (Shit) Storm: Discourses around the Proposal to Introduce a ‘Climate Passport’ in Germany*, ENV’T & PLANNING C: POL. & SPACE 1, 6 (2023).

178. Expert Council on Integration and Migration, *Climate Change and Migration: What we Know about the Connection and what Options there are for Action*, at 5 (May, 2023).

179. Aliens Act (2005:716), Ch. 4, § 2 (Swed.) (defining “a ‘person otherwise in need of protection’ who in cases is an alien who in cases other than those referred to [in the provision concerning refugees] is outside the country of the alien’s nationality, because he or she (1) feels well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, (2) needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses or (3) is unable to return to the country of origin because of an environmental disaster”)

180. The Finnish Aliens Act (2004:301), §§ 109, 110 (Fin.) (granting temporary protection to aliens residing in Finland who cannot return to their home country of residence due to “massive displacement . . . as a result of an armed conflict, some other violent situation or an environmental disaster,” and doing so even if there are no grounds under section 87 or 88 (persecution and non-refoulement) for granting asylum or providing subsidiary protection).

181. For modeling purposes, both the United States and India can look into definition clauses, currently lacking in both regimes. See text accompanying *supra* note 179.

182. McAdam, *supra* note 162, at 836; Jane McAdam, *From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement*, 39 UNSW L.J. 1518, 1535, 1537 (2017).

183. McAdam, *supra* note 162, at 838.

184. Sawant & Sanjeev, *supra* note 66, at 372, 376. See generally *Teitiota v. New Zealand*, *supra* note 55.

In *Teitiota*, the HRC concluded that climate change could provide a basis to protect people fleeing from their places of origin due to climate change related factors.¹⁸⁵ It recognized sea level rise as comparable to other natural disasters.¹⁸⁶ In her recent work, McAdam continues to note parallels between protection needs in the context of both disasters and climate change, stating that “drawing sharp distinctions between the two is unhelpful from a human rights and protection-oriented perspective.”¹⁸⁷

Under the international targets and indicators for the Sustainable Development Goals, climate change is measured by government actions to adapt to and mitigate climate-related disasters and natural disasters, which includes a broad range of disasters within climate-related indicators.¹⁸⁸ The *Teitiota* decision on climate refugees,¹⁸⁹ and scholarship by Scott¹⁹⁰ and McAdam,¹⁹¹ support conceptualization of climate refugees or climate-related displacement around climate-related extreme weather events and natural hazards.

The *Teitiota* case also provides a framework to implement commitments to address climate migration. It offers pathways under which “climate migrants could seek refugee protections under existing legal frameworks.”¹⁹² These frameworks could differ from the refugee framework that is currently insufficient to cover climate migrants. This case has confirmed that people displaced across borders due to climate change can be granted protection under human rights and refugee law if they satisfy certain conditions of these existing frameworks. These conditions are: (1) If the application of the refugee includes conflict induced by climate change, and (2) If the application of the refugee can demonstrate “imminent” and foreseeable threat to “right to life.”¹⁹³ While the application of refugee law will be limited to situations that are at the crossroads of climate change and conflict,¹⁹⁴ the application of human rights-based

185. *Teitiota v. New Zealand*, *supra* note 55, ¶ 9.14.

186. *Id.* ¶ 2.9 (stating that, “[t]he Tribunal accepted that, given the greater predictability of the climate system, the risk to the author and his family from sea level rise and other natural disasters could, in a broad sense, be regarded as more imminent than the risk posed to the life of the complainants in *Aalbersberg et al. v. the Netherlands*”).

187. McAdam, *supra* note 162, at 844.

188. Federica Doni et al., *What is the SDG 13?*, in *SDG13 – CLIMATE ACTION: COMBATING CLIMATE CHANGE AND ITS IMPACTS* 21 (2020).

189. *Teitiota v. New Zealand*, *supra* note 58.

190. Scott, *supra* note 47.

191. McAdam, *supra* note 57.

192. Lucia Rose, *The World After Teitiota: What the HRC Decision Means for the Future of Climate Migration*, 12 *SAN DIEGO J. CLIMATE & ENERGY L.* 41, 60 (2021).

193. *See Teitiota v. New Zealand*, *supra* note 55, ¶ 9.7 (considering that “a general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under articles 6 or 7 of the Covenant in the most extreme cases, where there is a real risk of harm simply by virtue of an individual being exposed to such violence on return, or where the individual in question is in a particularly vulnerable situation.”); *see also* Chhaya Bhardwaj, *Adaptation and Human Rights: a decision by the Human Rights Committee Daniel Billy et al. v. Australia CCPR/C/135/D/3624/2019*, 25 *ENV’T L. REV.* 154, 156–57 (2023).

194. Simon Behrman & Avidan Kent, *The Teitiota Case and the Limitations of the Human Rights framework*, 75 *QUESTIONS INT’L L.* 25, 30 (2020).

protections can be used to protect people whose lives are imperiled due to climate change and are displaced due to this threat.¹⁹⁵

C. *Lessons from the United States for India: Promise and Challenges*

The current U.S. framework combines legislative, executive, and judicial protection for people fleeing sources of environmental disruption.¹⁹⁶ The legislative and executive protections are broadly available for those residing in the United States when an environmental disaster or calamity manifests in the country of origin of that non-citizen resident.¹⁹⁷ These protections are known as TPS and Deferred Enforced Departure (“DED”) protections.¹⁹⁸ The fact that there is a federal agency and authority that can govern issues concerning those displaced across borders due to a variety of factors, including climate change, is an example of the good practices institutions can promote to protect people displaced due to climate change.¹⁹⁹ The U.S. regime in this context remains largely administrative, in contrast to the Indian system.

India currently does not have an institutional authority that governs refugee-related issues in India.²⁰⁰ Moreover, no institutional design has been proposed or is in place to govern climate refugees. The U.S. Department of Homeland Security as one of the agencies that works towards environmental security in India helps to centralize and coordinate this work.²⁰¹

India is already facing migration of Bangladeshis into the country due to climate change and rising sea levels.²⁰² However, even with this awareness, the Indian legal framework does not extend support to the Bangladeshi migrants in India.²⁰³ The Indian federal government engages on the issue of migration and refugees;²⁰⁴ however, there is no political will to establish an institution for refugee-related issues in India. Today, the issues of refugees, for example, the issue of protection of Rohingya refugees is handled by the combination of implementation of a judicial decision by the Ministry

195. Chhaya Bhardwaj, *Ioane Teitiota v New Zealand (advance unedited version)*, CCPR/C/127/D/2728/2016, 23 ENV'T L. REV. 263, 265 (2021).

196. See generally Chhaya Bhardwaj, *Climate Change Cross-Border Migration and the Biden Administration: What the Future Holds?*, 16 ENV'T JUSTICE 254 (2022).

197. *Id.*

198. *Id.* DED can be applied in climate change contexts. See Bhardwaj, *supra* note 196, at 257.

199. Terrence O'Sullivan & Jim Ramsay, *Defining and Distinguishing Homeland from National Security and Climate-related Environmental Security, in Theory and Practice*, 12 J. HOMELAND SEC. & EMERGENCY MGMT. 43, 45 (2015).

200. Sawant & Sanjeev, *supra* note 66, at 376.

201. O'Sullivan & Ramsay, *supra* note 199, at 45.

202. Sahana Bose, *Illegal Migration in the Indian Sunderbans*, 45 FORCED MIGRATION REV. 22, 22 (2014).

203. Vanita Banjan, *Border Narratives in South Asia: The Case of Bangladeshi Migrants to India*, 76 INDIAN J. POL. SCI. 1019, 1022 (2015).

204. S. Vijay Kumar, *Centre issues alert on illegal stay of Bangladeshi nationals*, THE HINDU (Nov. 6, 2022, 8:46pm), <https://www.thehindu.com/news/national/centre-issues-alert-on-illegal-stay-of-bangladeshi-nationals/article66104569.ece> [https://perma.cc/CNR7-B8LR].

of Home Affairs.²⁰⁵ For other refugees, generally, the existing framework for the protection of refugees in India is governed by the Ministry of Home Affairs in India on a case-by-case basis. This happens due to lack of an institutional structure consisting of a codified standard and procedure that can be seen in the U.S. system. Due to absence of an institutional design, the Indian system currently is highly discretionary, where differential standards may be applied in light of the facts of the case. There is no designated administrative unit which is responsible for “refugee status determination” or other administrative decision concerning refugees. Consequently, there are no prescribed rules of law and process to apply, to be processed, or to receive protection as a refugee in India.

The institutional design in the United States can be used to model it according to the national circumstances of India and allow a good practice to be integrated into the Indian regime. There is no doubt that the U.S. model cannot be transplanted to the Indian system; however, the following steps can be integrated from the U.S. model: (1) establishing administrative units and agencies with publicly available uniform standards concerning substantive and procedural laws that apply on asylum seekers; (2) implementing a mechanism to appeal the decision taken by administrative agencies concerning asylum and refugee protection; and (3) incorporating procedures containing non-refoulement and protection of right to life of non-citizens.

Existing law in India can be applied to protect those fleeing their country of origin due to climate change issues; however, it has not been applied yet. Under the Constitutionally guaranteed “right to life” protections, a person fleeing their country of origin due to climate change can approach the Constitutional Courts of India and seek protection that currently exists for asylum seekers and refugees. Alternatively, the applicants can also approach the Constitutional Courts for an expansive interpretation, while seeking protection under this rights-based regime. The existing legislative provisions also provide a small window for applicants to approach the Ministry of Home Affairs in India and seek protection “on humanitarian grounds” if a person is fleeing climate change. The Ministry, however, can exercise significant discretion in either accepting or rejecting the application.

D. Lessons from India for the United States: Promise and Challenges

Rights-based climate cases in the United States are on the rise around the country. While this nascent approach to climate change protection is not enshrined at the federal level as it is in India, the rights-based approach to climate refugees in India may be transferable to the United States, at least initially in the courts. One previous climate displacement case in U.S. courts sought USD \$400 million in projected relocation costs for the tiny Native Alaskan Village of Kivalina. While the Ninth Circuit dismissed the case on

205. *See generally* Mohammad Salimullah v. Union of India, Interlocutory Application No. 38408 (2021), W.P. (C) 793/2017.

standing and political question doctrine grounds, a rights-based approach could gain traction for a similarly situated U.S. Indigenous community on a U.S. rights-based theory, comparable to the petition currently pending before the Inter-American Human Rights Commission.²⁰⁶ Rather than citing the American Declaration, however, the legal foundations of the claim for climate displacement protection might be found in treaty-based rights or the Federal Trust Responsibility doctrine.²⁰⁷

The United States can benefit from India's rights-based approach to protect climate refugees. A recent line of strategic climate litigation cases in the United States that has sought to apply rights-based theories to protect vulnerable populations from climate-related harms may enable a rights-based approach to the protections of climate refugees. In *Juliana v. U.S.*,²⁰⁸ the youth plaintiffs asserted that the Due Process Clause of the Fifth Amendment to the U.S. Constitution should include a right to a stable climate system.²⁰⁹ After the U.S. Court of Appeals for the Ninth Circuit instructed the District Court to dismiss the claim for lack of standing and subject matter jurisdiction, the District Court allowed the youth plaintiffs to amend their complaint.²¹⁰ However, the Ninth Circuit issued a mandamus order to dismiss the claim again.²¹¹ Similarly, in *Held v. State*,²¹² another group of youth plaintiffs asserted that the state of Montana's climate change exception that prevented the consideration of climate change impacts in pursuing its fossil-fuel intensive energy system violated the youth plaintiffs' right to healthy environment in the Montana Constitution's environmental rights amendment.²¹³ On August 14, 2023, the trial court granted the youth plaintiffs' request for a declaratory judgment.²¹⁴

The United States can also draw inspiration from the origin and development of the right to a healthy environment in India. The original federal Indian Constitution did not contain a right to a healthy environment, yet environmental pressures like the Bhopal Gas tragedy and subsequent legal implications pushed the judiciary to read the right to a healthy environment as a constitutional right. Similarly, in the ongoing atmospheric trust litigation at the federal and state levels in the United States, courts could read a right

206. See generally Inter-Am. Comm'n H.R. Res. 50/2022 (Oct. 2, 2022).

207. See, e.g., Scott Stern, *A New Strategy for Indigenous Climate Refugees*, CTR. FOR PROGRESSIVE REFORM (Dec. 14, 2020), <https://progressivereform.org/cpr-blog/new-strategy-indigenous-climate-refugees/> [<https://perma.cc/8H6Q-RELT>].

208. 947 F.3d 1159 (9th Cir. 2020).

209. *Id.* at 1164.

210. See generally *Juliana v. United States*, Case No. 6:15-cv-01517-AA (Dist. Ct. Or. Dec. 29, 2023).

211. *United States v. United States Dist. Ct. Or.*, Eugene, D.C. No. 6:15-cv-1517, ¶ 4 (9th Cir. 2024).

212. *Held v. State*, Cause No. CDV-2020-307, (1st Jud. Dist. Ct., Lewis & Clark Cnty., Mont. 2023).

213. *Id.*

214. *Id.* at 3, 96; see also *In re Hawaii Electric Light Co.*, No. SCOT-22-0000418, at 16 (Haw. 2023) (concluding that the Hawai'i state constitution's environment rights clause encompasses right to a life-sustaining climate system based on the immediate climate threats that the state faces).

to a healthy environment and protection from climate change into state and the U.S. constitutions to enhance protection of climate displaced peoples on rights-based theories. Similar to India, this process could start with recognition in the courts through declaratory relief that such rights exist before they are ultimately enforced, which is the focus of the *Held* and *Juliana* cases that sought declaratory relief on constitutional rights-based theories.

One challenge of a rights-based framework in the United States is that it would, at best, only result in piecemeal and incremental protections. The lack of a federally recognized right to life and right to a healthy environment in the U.S. Constitution would limit the impact of a rights-based approach. Moreover, based on the experience of strategic climate litigation cases in the United States in the past decade, even limited victories in the courts would be rare and likely would be reversed on appeal in the federal system. In 2023 alone, the U.S. Supreme Court reversed a longstanding right protected under the Due Process Clause of the Fifth Amendment²¹⁵ and rolled back the scope of equally well-established environmental law protections.²¹⁶

A rights-based approach to climate displacement is, however, consistent with recent developments in environmental governance in the United States. First, there has been an uptick in the mainstreaming of environmental justice principles into U.S. environmental governance. Several recent developments at the federal level in the United States during the Biden administration, including the Justice 40 initiative²¹⁷ and the Inflation Reduction Act,²¹⁸ integrate environmental justice principles into environmental decision-making.²¹⁹ Rights-based approaches to environmental governance are also increasing in the rise of Earth law in the United States, which includes the rights of Nature, rights of future generations, and animal rights. Therefore, there is some hope that a rights-based approach to climate displacement will take hold in the United States in the near future.

CONCLUSION

The challenge to protect “climate refugees” has many layers. First, it is difficult to employ consistent terminology to describe the climate migration phenomenon to ensure maximum protection and minimal stigmatization of marginalized groups. This article proposes use of the term “climate refugees”

215. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 256 (2022) (finding that the right to abortion is not conferred in the Constitution as it is not an essential component of “ordered liberty”).

216. *See, e.g., Sackett v. EPA*, 598 U.S. 651, 684 (2023) (holding that the Clean Water Act applies only to wetlands with a continuous surface connection to traditional navigable waters, limiting the scope of enforcement of the Act).

217. *Justice40: A Whole-of-Government Initiative*, WHITE HOUSE (Nov. 13, 2023). <https://www.whitehouse.gov/environmentaljustice/justice40/> [https://perma.cc/666C-YNMK].

218. Inflation Reduction Act of 2022, H.R. 5376 (United States).

219. Scholars outside the United States have also addressed this linkage between environmental displacement and environmental justice protections. *See, e.g., Francesca Rosignoli, Environmental Justice and Climate-Induced Migration*, in CLIMATE REFUGEES, *supra* note 7 at 301, 301–02.

as an inclusive term to determine who is eligible for protection and under what circumstances. It suggests that the term should include all persons displaced across borders due to climate-related factors. These climate-related factors can then include but are not limited to climate-induced disasters, climate-induced conflicts, environmental degradation, and natural resource shortage related conflict.

Another challenge in protecting climate refugees is what sources of law will apply and through what mechanisms and strategies. While this article recognizes that international and regional protections have an important role to play, it argues that domestic law protections in major destination countries like the United States and India can and should play a significant role in developing an effective response to this crisis. The existing systems in India and the United States that are responding to the climate refugee crisis each has strengths that the other can employ to some degree, and both countries can learn from other frameworks under foreign domestic law and international law.

The U.S. system offers the advantage of an existing framework of refugee law that can be applied to protect climate refugees. The system is limited, however, in its ability to provide a human rights-based approach to protecting climate refugees, like the system in India. A recent wave of human rights-based theories in climate litigation in the United States offers some promise for a limited application of human rights-based principles to the protection of climate refugees.

The Indian system is currently operating on a rights-based approach derived from the Indian Constitution. The Constitution guarantees the “right to life” to its citizens and aliens in India, which human rights advocates typically use to protect migrants and refugees in India by approaching the Supreme Court of India for their protection. This rights-based judicial approach has been advantageous in the absence of a refugee law framework in India and has been used to protect migrants, refugees, internally displaced persons, and people affected by environmental factors. The United States may benefit from engaging the rights-based approach system in India. The *Teitiotia* case also confirms that a rights-based approach can create pathways to protect climate refugees globally.

India can benefit significantly from the historical and existing refugee law framework in the United States. The framework provides for centralization, institutionalization, and coordination among agencies, both locally and federally, allowing for a more uniform practice for refugee and migrant protection. India can benefit from institutionalization of refugee protection processes and prevent irregular migration through its porous borders. Both the United States and India are destination countries for those seeking refuge due to climate-related reasons. Therefore, both countries can integrate legal frameworks within their domestic systems and create norms that are otherwise largely absent from the global, regional, and local practice to protect climate refugees.