

**Legal Protection for Climate Refugees Under the Principle of 'Loss & Damage':
A Case Study of South Asia**

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1. INTRODUCTION

1.1. Climate-Induced Displacement – A Global Issue

There are many factors which result in the displacement and migration of people and communities, ranging from war, famine, disasters, and economic instability.¹ The impacts of climate change are causing further displacement around the world.² This paints a grim picture for the years ahead, especially with the release of the Sixth Assessment Report by the IPCC which predicts further extreme weather events, such as severe heatwaves, and the threat of sea-level rise.³ This poses serious challenges to the protection of those who will be displaced due to climate change around the world.

According to the World Bank, an estimated 143 million people from the regions of sub-Saharan Africa, South Asia and Latin America alone will be displaced by 2050 due to the climate change crisis.⁴ Of this figure, 62.9 million people are expected to be displaced in South Asia by 2050.⁵ While studies have previously discussed the threats of internal migration due to climate change,⁶ the unpredictability of the impacts of climate change and other socio-economic factors will create unprecedented numbers of climate refugees, some of whom will have no other option but to cross international borders to seek protection. This begs to ask the question whether international and domestic laws are sufficient to offer legal protection to climate refugees.

¹ UNHCR, 'Global Trends: Forced Displacement in 2017' (2017) <http://www.unhcr.org/globaltrends2017/> accessed 3 September 2021

² UNHCR, 'Displaced on the frontlines of the climate emergency' (2021) <https://www.unhcr.org/uk/news/press/2021/4/60811c554/data-visualization-reveals-impacts-climate-change-displacement.html> accessed 3 September 2021

³ IPCC, 'Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (2021) Cambridge University Press

⁴ Kumari K Rigaud and Others, 'Groundswell: Preparing for Internal Climate Migration' (2018) World Bank

⁵ Harjeet Singh and Others, 'Cost of Climate Inaction: Displacement and Distress Migration' (2020) ActionAid

⁶ See for example Jorge A Miguel and Others, 'The relationship between climate change and internal migration in the Americas' (2021) Management of Environmental Quality 1477-7835

South Asia is one of the most vulnerable countries to the impacts of climate change.⁷ Despite being low emitters of greenhouse gases to the atmosphere, countries in South Asia remain some of the most affected by the changing climate.⁸ In this paper, I offer a case study of South Asia, focusing on the state practices of five South Asian countries as they relate to climate change. The countries included in this analysis are Afghanistan, Pakistan, India, Bangladesh and Nepal. I argue that international and domestic laws are inadequate in the protection of climate refugees. However, recourse may be sought elsewhere. In arriving at possible pathways for legal protection of climate refugees, this paper looks at the Warsaw International Mechanism (WIM) for Loss and Damage, which has been incorporated under Article 8 of the Paris Agreement.⁹

The principle of loss and damage focuses on recommendations and protection for those affected by the impacts of climate change. It looks at risks being ‘intolerable’, and includes concepts such as ‘non-economic losses’.¹⁰ By approaching this principle with fundamental rights, such as the right to life under article 6 of the ICCPR,¹¹ this paper argues that displacement caused due to climate change would account to risks which are intolerable and unavoidable, as they would result in or risk the loss of life, livelihoods, property, and access to food and shelter.

The main objective of this research is to examine the legal frameworks which can offer protection to climate refugees. It investigates the extent to which loss and damage can bridge the gaps in the climate regime. Through this analysis, this paper puts forward the principle of loss and damage as a possible framework granting legal protection for climate refugees in South Asia. This paper will also contribute significantly to the climate change regime as it carefully links loss and damage to international human rights law, an analysis which has not been looked at in detail in the past.

⁷ IPCC, ‘Climate Change 2014: Impacts, Adaptation, and Vulnerability. Summary for Policymakers’ (2014)

⁸ Ibid

⁹ Art 8, Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015

¹⁰ Dow and Others, ‘Climate change, limits to adaptation and the loss and damage debate’ (2013) E-International Relations 13

¹¹ Art 6, UNGA, International Covenant on Civil and Political Rights, 16 December 1966

1.2. Why We Must Speak of Climate Refugees

With the troubling predictions of the impacts of climate change in South Asia, it is now important to acknowledge that communities will be driven out of their homes. This displacement will be severe as the region is politically unstable, and patterns of refugee movements already exist within the countries in question.¹² The increase in temperatures, frequency of severe weather events such as floods, and the threat of sea-level rise will cause drastic changes in patterns of migration in South Asia. Of particular concern is Afghanistan, which has seen the revival of the Taliban in 2021, and poses major challenges for socio-political stability in South Asia.¹³ This is an indicator of severe refugee movements, which will only be exacerbated by the impacts of climate change. Therefore, it is of utmost importance to include climate refugees and their protection in the discourse surrounding climate change, as they have already been excluded from major legal frameworks. With the growing numbers of climate displacement, it is unacceptable that international law does not extend the same protection to climate refugees as it does to those displaced by conflict and violence.

This paper acknowledges the anxiety around the term ‘climate refugees’ which has been studied in the past. However, the debate surrounding the terminology and definition of climate refugee is not within the scope of this paper. Instead, this paper focuses on South Asia’s crucial problems to the impacts of climate change which will result in both internal displacement, as well as cross-border migration. For the purposes of this research, the term ‘climate refugees’ is used for people who will be displaced due to the impacts of climate change, regardless of whether that displacement is internal, or cross-border.

¹² UNHCR, ‘Global Report: 2020’ (2020) <https://reporting.unhcr.org/sites/default/files/gr2020/pdf/GR2020_English_Full_lowres.pdf#_ga=2.90341082.1911355646.1630867419-1778833259.1629803414> accessed 1 September 2021

¹³ UNHCR, ‘Afghanistan: Situation Emergency Update’ (2021) UNHCR Regional Bureau for Asia and Pacific <<https://data2.unhcr.org/en/documents/details/88442>> accessed 2 September 2021

1.3. Structure of the Dissertation

This paper is divided into five parts; with the first part offering the introduction into climate displacement and the overview of the research to follow.

The second part is titled ‘Climate Refugees: International & Regional Laws’, and offers an analysis of both international treaties such as the 1951 Convention Relating to the Status of Refugees, as well as individual refugee policies of five South Asian states. This section concludes that the existing policies are inadequate and discriminatory, and proposes that remedy may be sought elsewhere with the help of principles of international law.

Part 3 is titled ‘Loss and Damage’, and studies the background of WIM in the UNFCCC. This section makes a strong case for loss and damage as a main provision to deal with the plight of climate refugees. To further the need for the implementation of loss and damage into the climate change framework, this chapter analyses recent global developments in climate litigation, discussing cases such as *Luciano Lliya v RWE AG*,¹⁴ and *Native Village of Kivalina v ExxonMobil Corporation*.¹⁵ It argues that human rights tools have been used to seek compensation and liability in the past, and can be effectively developed within the climate change regime.

In Part 4 of this paper titled, ‘Loss and Damage, Climate Litigation, and Climate Refugees in South Asia’, this paper offers a more regional approach to loss and damage. This chapter looks at the various claims brought towards the courts of the South Asian states which deal with environmental protection, or climate change. In some landmark cases, such as *Asghar Leghari v. Federation of Pakistan*,¹⁶ the Court has acknowledged the right to life as being violated by inadequate state policies concerning climate change. Elsewhere, such as *Ridhima Pandey v Union of India*,¹⁷ the existence of climate refugees has been highlighted for the first

¹⁴ *Luciano Lliya v RWE AG* [2015] Essen Regional Court, Case No. 2 0 285/15

¹⁵ *Native Village of Kivalina v ExxonMobil Corp* [2008]

¹⁶ *Asghar Leghari v Federation of Pakistan* [2015] W.P No. 25501/201 Lahore High Court

¹⁷ *Ridhima Pandey v Union of India* [2017] National Green Tribunal, New Delhi

time. Using the links of human rights law, this chapter concludes that the principle of loss and damage can thus take centre stage for climate refugees in the protection of their rights.

The 5th and final section of this paper is the conclusion, which provides a summary of the recommendations made in the paper.

2. Climate Refugees: International & Regional Laws

2.1. Introduction: Climate Change and Displacement

The relationship between climate change and human displacement is complex as patterns of migration are influenced by various factors. As it has been noted in previous studies, the link between climate change, displacement and migration is multifaceted,¹⁸ and is exacerbated by factors such as lack of resources, means of livelihoods, conflicts, and lack of effective governance.¹⁹

There have also been distinctions between climate change-related migrations which are gradual, and others which are rapid. The IPCC's report on climate change adaptation differentiates between these two.²⁰ Rapid onset climate migration concerns the displacement of people caused by sudden natural disasters such as flooding and storms,²¹ and usually occurs on a large scale and is often temporary.²² Slow onset migration involves the gradual displacement pattern which is more permanent,²³ which may be caused by the inability to maintain an adequate standard of living due to climatic conditions.²⁴ Climate-induced

¹⁸ Camillo Boano, Roger Zetter and Tim Morris 'Environmentally Displaced People Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration' (2008) 1 FMR, Briefing 1, 1–44, 9

¹⁹ UNHCR, 'Summary of Deliberations on Climate Change and Displacement' www.unhcr.org/4da2b5e19.pdf accessed 18 April 2018

²⁰ Philip Dane Warren, 'Forced Migration After Paris Cop 21: Evaluating the Climate Change Displacement Coordination Facility' (2018) 116 (8) Colum. L. Rev, 2103 <https://columbialawreview.org/content/forced-migration-after-paris-cop21-evaluating-the-climate-change-displacement-coordination-facility/> accessed 21 April 2018

²¹ Sarah Opitz Stapleton, Rebecca Nadin, Charlene Watson and Jan Kellett, 'Climate Change, Migration and Displacement: The Need for a Risk-Informed and Coherent Approach' (UNDP 2017) 9

²² Graeme Hugo, 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (2010) Bloomsbury Publishing 9–37.

²³ Ibid

²⁴ Shweta Jayawardhan, 'Climate Change, Vulnerability, and Displacement' (2017) 17(1) JSD 103

displacement has further been classified into ‘forced’ and ‘voluntary’ movements, which are identified by the time available to prepare for the move, and the degree of intent.²⁵

Whatever the initial cause of climate-induced migration, it is likely to be a frequent occurrence in the years to come.²⁶ Its long-lasting impacts are likely to trigger conflict in regions of socio-economic instability and create further violence and displacement in communities.²⁷ It is because of these reasons that a close examination of current climate change policy frameworks is necessary, especially in regions such as South Asia where adverse impacts of climate change are expected to occur.²⁸

2.2. Climate Change and Displacement in South Asia

While environmental change may not be the only reason for migration, sudden onset disasters are crucial to understand from the context of displacement. Natural disasters are increasing in frequency,²⁹ and the impacts of such disasters are felt severely by those who already live in vulnerable conditions.³⁰ South Asia includes some of the world’s most vulnerable countries to the impacts of climate change,³¹ where countries are negatively impacted as communities do not have adequate resources to adapt and recover from the natural disasters which strike their regions.

²⁵ Joanne Runkel and Alexis Conklin, *Climate Change, Migration, and Displacement: The Under-estimated Disaster* (University of Hamburg 2017) 9

²⁶ Stellina Jolly and Nafees Ahmad, ‘Climate Refugees in South Asia; Protection Under International Legal Standards and State Practices in South Asia’ (2019) 12

²⁷ Ibid

²⁸ Asia (2014) *Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press 1327-1370.

²⁹ Integrated Regional Information Networks (IRIN), *Disaster Reduction and the Human Cost of Disaster* (Nairobi, IRIN Web Special, 2005)

³⁰ John Podesta, ‘Climate Crisis, Migration and Refugees’ (2019) *Global Economy and Development*

³¹ IPCC, 2014 (n7)

As noted in the introductory chapter, it has been estimated that more than 62.9 million people will be at risk of climate-induced displacement in South Asia by 2050.³² The Sixth Assessment Report of the IPCC is also a testament to the challenges the region of South Asia will face if climate change is not immediately and effectively tackled. The IPCC report predicts more frequent and severe weather events for South Asia, such as heatwaves, storms, and excessive flooding.³³ Moreover, the report also shows that South Asia will see a decline of crop production due to climate change.³⁴ This poses a major challenge for the region, where countries rely on agriculture for their livelihoods and economy.

South Asia has remained a vulnerable region to climate change for decades. In previous studies, the climate change impact in the region has been predicted to cause temperature rise of 0.5 to 2 degree C by 2030, and 1-7 degree C by 2070.³⁵ In 2015 alone, Pakistan and India witnessed one of the most intense heatwaves in their histories, accounting for more than 3700 heat-related deaths in the region.³⁶ It is also estimated that an increase of temperature of 2 degree C would put cities like Karachi and Kolkata at the risk of annually occurring heatwaves the likes of the 2015 incidents.³⁷

In 2019, South Asia saw a record 9.5 million people being displaced due to disasters.³⁸ The report showed that the five countries where displacement was highest were India, Bangladesh, Afghanistan, Nepal and Pakistan.³⁹ These are the five countries which have also been included in this paper to examine state policies in light of climate refugees. In the next section, I begin this paper's analysis of climate refugees in international and domestic laws.

³² Harjeet Singh & Others (n5)

³³ IPCC, 2014 (n7)

³⁴ Ibid

³⁵ Preston and Others, 'Climate Change in the Asia/ Pacific Region: A Consultancy Report prepared for the Climate Change and Development Roundtable' (2006) Australia, Commonwealth Science and Industry Research Organisation 2

³⁶ Jolly and Ahmad (n26)

³⁷ Ibid

³⁸ Grid 2020, 'Global Report on Internal Displacement' (2020) Internal Displacement Monitoring Centre 47

³⁹ Ibid

2.3. Analysis of Climate Refugees in International Law

i. 1951 Geneva Convention

Due to the great numbers of forced migrations in the aftermath of World War II, the United Nations formulated the Convention to the Status of Refugees, also known as the Geneva Convention. This was an attempt to offer legal protection to refugees, and it reads as follows:

“Any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁴⁰

This is an example of how contemporary international law only accords protections to political refugees. Climate change is known to act as a threat multiplier for refugee movements,⁴¹ however, the legal regime does not cover climate refugees in its definition. Firstly, the definition applies to people who have crossed an international border. This is especially concerning since most of the anticipated movement caused by climate change is predicted to be internal migration, with most of the displaced persons not having crossed an international border at all.⁴²

Secondly, it is difficult to characterise climate change as ‘persecution’, because impacts of climate change do not meet the threshold of persecution as it is identified within international and domestic law.⁴³ The grounds of persecution do not include the effects of climate change, and a discriminatory element is required which proves that a persecutor has engaged in an act

⁴⁰ Art 1, Convention Relating to the Status of Refugees (1951) 189 UNTS 137

⁴¹ United Nations Environment Program, ‘Disasters and Conflicts: Climate Change and Security Risks’ <<http://web.unep.org/disastersandconflicts/what-we-do/risk-reduction/climate-change-and-security-risks>> accessed 1 September 2021.

⁴² Jane McAdam, ‘Climate Change, Forced Migration, and International Law’ (2012) Oxford University Press, 43

⁴³ Ibid

of discrimination based on a distinctive attribute.⁴⁴ Hence, claims of persecution regarding climate change are difficult as it is complicated to identify a persecutor. For example, in small island states such as Kiribati and Tuvalu, climate change is threatening livelihoods as the islands are expected to be under water within a few decades.⁴⁵ However, within these states identifying a persecutor proves to be challenging as the governments of these states cannot be held responsible for climate change.⁴⁶

It is evident from the discussion above that climate refugees do not fall under the Geneva Convention. However, this does not negate potential for development within the regime for the protection of refugees. Indeed, the definition of refugee has been expanded in the past offering a more inclusive approach to refugees. One example of this is the definition under The Cartagena Declaration on Refugees which was adopted in 1984, and defines refugees as they are defined under the Geneva Convention, with the addition of refugees who have ‘fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’⁴⁷ While the provisions within the Cartagena Declaration are non-binding, they point towards a positive trend which sees the need to redefine and reconceptualise refugees as understood in international law.

So far, international law as it relates to refugees is marred by legal gaps which will fail the duty to protect climate refugees. But exactly what is at loss in the failure to protect climate refugees? The next section deals with the fundamental human rights as they relate to climate refugees, and how human rights law can offer some respite in the challenges climate refugees face.

ii. International Human Rights Law

⁴⁴ Ibid, 44

⁴⁵ John Campbell and Olivia Warrick, ‘Climate Change and Migration Issues in the Pacific’ (2014) United Nations Economic and Social Commission for Asia and the Pacific 4

⁴⁶ McAdam, (n42) 45

⁴⁷ The Cartagena Declaration on Refugees (1984)

The climate change crisis heavily impacts fundamental human rights. The rights of people at risk of violation due to state negligence and legal barriers in international law include, but are not limited to the right to life, right to be free from cruel, inhuman or degrading treatment, as well as the right to an adequate standard of living.⁴⁸

According to the General Comment No. 36, the right to life under the ICCPR includes protection from acts which may result in a person's 'unnatural or premature death.'⁴⁹ Moreover, it also notes that 'arbitrary deprivation' of life as is understood under the ICCPR includes 'otherwise foreseeable and preventable' harm caused.⁵⁰ From the context of climate refugees, this is an important addition as it also stresses that states may be in violation of this right if they fail to prevent foreseeable threats, regardless of whether the threat results in the direct loss of life.⁵¹ Taking into consideration the Sixth Assessment report by the IPCC,⁵² it is important to remember that extreme weather events which have been predicted in South Asia could result in a direct loss of life, in which case, states would be responsible for failure to protect the right to life of climate refugees.

More relevant to climate refugees is the principle of non-refoulement under human rights law and refugee law. In 2020, a significant development was made in the climate change regime when the United Nations Human Rights Committee (UNHRC) ruled that the repatriation of climate refugees to the countries affected by climate change is unlawful as it risks the protection of people from cruel, inhuman or degrading treatment.⁵³ This decision came after the prominent case of *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment*,⁵⁴ wherein the claimant sought protection in New Zealand from the extreme climate change impacts in his home country of Kiribati. His claims for protection were

⁴⁸ McAdam, (n42) 56

⁴⁹ General Comment No. 36, Art 6, International Covenant on Civil and Political Rights [2018] HRC

⁵⁰ Ibid

⁵¹ Ibid

⁵² IPCC, 2021 (n3)

⁵³ *Teitiota v New Zealand* [2020] Human Rights Committee, UN Doc. CCPR/C/127/D/2728/2016

⁵⁴ Ibid

denied, and he was repatriated to Kiribati.⁵⁵ Even though the UNHRC's decision that forced repatriation of climate refugees is unlawful is not legally binding, it is grounded in human rights law principles which states are obligated to uphold.⁵⁶

The above discussion confirms that a scope for the application of human-rights based approach has positive implications for the protection of the rights of climate refugees. Another treaty which needs to be talked about in this analysis is the Paris Agreement. The treaty falls short in the protection of climate refugees, as it does not contain provisions on the legal status or legal protection of climate refugees.⁵⁷ However, it has incorporated the WIM for Loss and Damage, and requires a brief introduction as the principle has been offered as a significant contribution to the protection of climate refugees.

iii. The Paris Agreement

The Paris Agreement is a landmark international treaty as it has set states to respect their obligations to work towards reducing their GHG emissions. With over 190 countries party to the treaty- which include the five South Asian countries under analysis in this paper- the Paris Agreement works on a 5-year cycle, with countries communicating their action plans to tackle climate change under their Nationally Determined Contributions (NDCs).⁵⁸

Of more importance to the purpose of this research is the recognition of climate migrants within the Paris Agreement. The treaty does not mention any explicit legal recognition of climate refugees, nor does it provide any framework for their protection. However, the treaty's preamble acknowledges the vulnerability of migrants to the impacts of climate change.⁵⁹ Additionally under article 8 of the Paris Agreement, the WIM for Loss and Damage

⁵⁵ Ibid

⁵⁶ Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement' (2020) *American Journal of International Law* 712

⁵⁷ Paris Agreement, 2015 (n9)

⁵⁸ Ibid

⁵⁹ Ibid

has been used to address the need for a taskforce on displacement, with the purpose to ‘avert, minimise and address displacement related to the adverse impacts of climate’.⁶⁰

This section has seen various developments within international law as they relate to climate change. These developments may seem restrictive on the outset, but they are a reminder that amendments within the legal regime are possible. One way to discuss the protection of climate refugees in South Asia is to analyse the principle of loss and damage as included in the Paris Agreement with a human rights-based approach. The third chapter will focus on this interlinkage, and offer ways to work for the protection of climate refugees. It is important to analyse this approach from the context of South Asia, where vulnerable countries are not equipped to effectively manage further displacement and refugee movements. For this reason, I will first turn to an analysis of regional refugee laws currently in place in South Asian states, looking at the extent to which they may offer respite to climate refugees.

2.4. Regional Legal Frameworks

As discussed earlier, a case-study of five South Asian countries, which include Afghanistan, Pakistan, India, Bangladesh and Nepal, and their domestic practices has been included in the analysis of this paper. Displacement in these countries is a common phenomenon, which will only worsen with the persisting effects of climate change. With the political instability currently impacting the region (as is discussed below from the perspective of Afghanistan), it is important to question legal protection gaps which will place climate refugees at further risks.

2.4.1. Afghanistan:

Discussing Afghanistan’s political situation is crucial for the analysis of climate refugees in South Asia. At the time of writing this paper, the conflict in Afghanistan has escalated and there is increasing uncertainty regarding the political situation of the country. With the US-Taliban Peace Deal signed during the presidency of Donald Trump, it was negotiated that US

⁶⁰ Ibid

military personnel would withdraw from Afghanistan, which was subject to Taliban being committed towards reducing violence and terrorist activities.⁶¹

After nearly 20 years, the US government, under the presidency of Joe Biden, announced in April 2021 that they would be withdrawing their troops from Afghanistan.⁶² This announcement was concerning since an unclassified report issued by the US Intelligence Agency had predicted that a withdrawal of US troops would risk Afghanistan falling under the control of the Taliban, ensuing further escalation of violence.⁶³ The following month, Taliban attacks in Afghanistan began to increase, and major cities began to fall under the control of Taliban. With the Afghan government's collapse, Taliban gained full control of Afghanistan in mid-August,⁶⁴ which saw an unprecedented number of people risking their lives to flee the country.⁶⁵

The situation in Afghanistan is a warning for mass displacements and refugee movements. At the time of writing this paper, Afghanistan has witnessed a major attack in Kabul, which has resulted in the loss of more than 100 lives.⁶⁶ The aftermath of the persisting uncertainty in the region, coupled by the prevalence of terrorist activities means civilians living in Afghanistan will likely face further displacement. Even before the withdrawal of US troops and subsequent control of the Taliban, Afghanistan had already witnessed its highest number of conflict-related casualties in 2021.⁶⁷ According to a report published by the UN Office for the

⁶¹ Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan and the United States of America (2020) < <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>> accessed 28 August 2021

⁶² 'Biden will withdraw all U.S forces from Afghanistan by Sept. 11, 2021' The Washington Post <https://www.washingtonpost.com/national-security/biden-us-troop-withdrawal-afghanistan/2021/04/13/918c3cae-9beb-11eb-8a83-3bc1fa69c2e8_story.html> accessed 29 August 2021

⁶³ US Government, 'Annual Threat Assessment of the US Intelligence Community' (2021) <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2021-Unclassified-Report.pdf> accessed 31 August, 2021

⁶⁴ '20-Year U.S War Ending as It Began, With Taliban Ruling Afghanistan' (2021) The New York Times, <<https://www.nytimes.com/live/2021/08/15/world/taliban-afghanistan-news>> accessed 31 August 2021

⁶⁵ UNHCR, 'Afghanistan: Situation Emergency Update' (2021) Regional Bureau for Asia and Pacific <<https://data2.unhcr.org/en/documents/details/88442>> accessed 2 September 2021

⁶⁶ 'Kabul Airport Attack Kills 13 U.S Service members, at Least 90 Afghans' (2021) The Wall Street Journal, <<https://www.wsj.com/articles/afghanistan-kabul-airport-explosion-11629976397>> accessed 31 August 2021

⁶⁷ UNHCR, 'Afghanistan Situation Regional Refugee Preparedness and Response Plan, Summary & Inter-Agency Funding Requirements July-December 2021' (2021)

Coordination of Humanitarian Affairs, over 558,000 Afghans had been internally displaced during the period of 1 January 2021 to 9 August 2021.⁶⁸ Currently, it is estimated that a further 515,000 displaced Afghan refugees will flee across borders.⁶⁹

In the neighbouring countries of Afghanistan, the registered number of Afghan refugees is more than 2.2 million (as of 31 December 2020), with a major population being present in Pakistan (more than 1.4 million), and Iran (780,000).⁷⁰ With the predicted arrival of further displacement and cross-border movements, it is important to analyse the different ways in which this conflict could pan out in the region of South Asia. While the Afghan government was a party to the United Nations Convention on the Status of Refugees (UNCSR), and the 1967 Additional Protocol,⁷¹ it is naïve to assume that the Taliban would uphold their commitments under international human rights treaties. The Taliban have so far claimed that they would abide by international law, however reports of targeted killings have already begun to emerge as reported by Human Rights Watch.⁷²

This escalating conflict in the region will prove to create a tremendously complex situation in the country with the advent of climate change resulting in lack of food and resources, and intensified migratory patterns among the population. Article 7 of the constitution of Afghanistan offers legal protection to all persons under the human rights treaties, however, the implementation of this article for climate refugees could prove to be challenging with the absence of a democratic government, and the intensified conflict.

Unfortunately, it seems that Afghanistan does not possess a domestic framework for the protection of climate refugees predicted to emerge with the prevalence of climate impacts in the region. This is why it is important for the international community to monitor and provide

⁶⁸ OCHA, 'Internal Displacement Due to Conflict: Afghanistan, Humanitarian Response', (2021) <https://www.humanitarianresponse.info/en/operations/afghanistan/idps> accessed 31 August 2021

⁶⁹ UNHCR, (n67)

⁷⁰ Ibid

⁷¹ UNHCR, 'State parties, reservations and declarations to the 1951 Refugee Convention Relating to the Status of Refugees' (2019)

⁷² Human Rights Watch, 'Afghanistan: Mouting Taliban Revenge Killings', (2021) <https://www.hrw.org/news/2021/07/30/afghanistan-mounting-taliban-revenge-killings> accessed 31 August 2021

resources which could help displaced people from Afghanistan seek protection elsewhere. With the neighbouring countries being severely underfunded in this regard, and having already housed a major population of Afghan refugees, this responsibility now falls upon the global North. Perhaps the principle of loss and damage, as will be discussed in the later part of this paper, could provide for legal protection in this regard and avoid Afghans from being neglected in the discourse surrounding climate refugee protection.

2.4.2. Pakistan:

Pakistan is not officially party to the UNCSR, nor the 1967 Additional Protocol,⁷³ but the country has hosted a significant refugee population from around the world, especially from Afghanistan. Pakistan has remained within the norms of international protection, and as of 2020 has hosted more than 1.4 million registered Afghan refugees.⁷⁴ Pakistan works under UNHCR's 'Solutions Strategy for Afghan Refugees', whereby the principle of non-refoulment is applied and voluntary repatriation of Afghan refugees is preferred.⁷⁵ However, it is reported that Afghanistan saw the least number of voluntary repatriations from Pakistan since 2002. This has been due to the fact that the region has been heavily impacted by increased violence, unsuccessful peace talks between the two countries, and the effect of Covid-19 on healthy lifestyles and restrictions on movement.⁷⁶

This has serious implications for both Afghanistan and Pakistan, as people would be severely impacted due to the impacts of climate change in the region. While Pakistan has to remain within the norms of customary international law and abide by the principle of non-refoulment, the absence of a binding law in place for refugees within the country's constitution will exclude many peoples and communities from legal protection.

⁷³ UNHCR, (n71)

⁷⁴ UNHCR, 'Global Focus, Operation: Pakistan' (2020) <https://reporting.unhcr.org/pakistan> accessed 24 August 2021

⁷⁵ UNHCR, '2021 Planning Summary, Operation: Pakistan', (2021) <https://reporting.unhcr.org/sites/default/files/pdfsummaries/GA2021-Pakistan-eng.pdf> accessed 24 August 2021

⁷⁶ Ibid

Coupled with border tensions, the uncertain laws in place during the Taliban takeover of Afghanistan, and the looming security threat in the region of South Asia, it seems difficult to imagine a space for climate refugees seeking protection in Pakistan. This proves the dire need in the country for an extensive domestic policy for the protection of those seeking refuge from all forms of human displacement, whether it is conflict, persecution, or climate-induced.

2.4.3. India:

Like Pakistan, India is not signatory to the UNCSR or its 1967 Additional Protocol.⁷⁷ Despite this, India continues to grant asylum and refugee status to people from its neighbouring states. As of 2020, India has a registered number of an estimated 40,000 persons who are refugees and asylum seekers.⁷⁸

The status of refugees in India is determined by ad hoc administrative decisions, where the laws applicable to those seeking refuge fall under the Foreigner Registration Act of 1939 and 1956, as well as the Passport Act of 1920 and 1967.⁷⁹ A number of cases within the Indian judiciary have offered protection to refugees in India, with the Supreme Court of India playing a major role in setting a precedent for further protection.⁸⁰ While the precedent set out by the Indian judiciary is one of remarkable potential in the context of climate refugees, it would be difficult to assume that it would remain consistent in the protection of climate refugees in the absence of a thorough domestic law.

Moreover, in 2019, India came under well-founded criticism when it implemented its Citizenship (Amendment) Act 2019 (CAA). In a press briefing by the UNHCR, it was noted that India's developments regarding the citizenship act of 2019 were discriminatory as they disallowed those belonging to Muslim faith from seeking citizenship protection.⁸¹ With India being a party to the ICCPR and the Convention for the Elimination of Racial Discrimination, the amendment in its citizenship act clearly violates the prohibition of discrimination as set out in international treaties. It is also a clear violation of Article 14 of the Constitution of India which guarantees a right to equality.⁸²

⁷⁷ UNHCR, (n71)

⁷⁸ UNHCR, 'Global Focus, Operation: India', (2020) <https://reporting.unhcr.org/node/10314?y=2020#year> accessed 24 August 2021

⁷⁹ Jolly & Ahmad, (n26) 135

⁸⁰ See for example, *Khudram Chakma v State of Arunachal Pradesh and Ors*, and *National Human Rights Commission v State of Arunachal Pradesh*

⁸¹ UNHCR, 'Press Briefing On India, 13 December 2019' (2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25425> accessed 24 August 2021

⁸² Art 14, Constitution of India

The CAA is concerning as it limits and restricts legal protection being sought by refugees in South Asia. It intentionally uses the term ‘migrant’ to deprive those seeking refuge under the norms of international refugee law.⁸³ From the context of climate refugees, this law stands in the way of granting protection which is free from non-discriminatory practices and biases to people at a potential of being displaced in South Asia.

2.4.4. Bangladesh:

Bangladesh currently hosts more than 860,000 registered Rohingya refugees.⁸⁴ Without the presence of a domestic policy framework for refugees, the government of Bangladesh follows the principle of voluntary repatriation to solve the influx of its refugee movements.⁸⁵ Having not signed the 1951 Refugee Convention or its 1967 Protocol,⁸⁶ the refugees in Bangladesh remain exposed to risks and failures within the country’s protection schemes.

The onset of Covid-19 mixed with the frequency in gang-related violence within the refugee camps in Bangladesh in 2020, saw serious challenges in the implementation of effective protection of refugees.⁸⁷ As a result of which, many refugee families fled the camps using risky means in pursuit of better conditions.

Bangladesh has frequently been mentioned in climate-change discourse as being one of the most vulnerable countries to the adverse impacts of climate change. Yet, it has no domestic framework in place to protect climate refugees who will enter its borders. While the country’s constitution has protection available to ‘foreigners’ under a number of its provisions,⁸⁸ these

⁸³ Jolly and Ahmad, (n26) 137

⁸⁴ UNHCR, ‘Global Focus, Operation: Bangladesh End of the Year Report’ (2020) <https://reporting.unhcr.org/bangladesh> accessed 24 august 2021

⁸⁵ Ibid

⁸⁶ UNHCR, (n71)

⁸⁷ Guardian, ‘Gang Violence erupts in Bangladesh Rohingya Camps Forcing Families to Flee’, (2020) <https://www.theguardian.com/global-development/2020/oct/09/gang-violence-erupts-in-bangladesh-rohingya-camps-forcing-families-to-flee> accessed on 24 August 2021

⁸⁸ See for example, Bangladesh Foreigners Act of 1946, Bangladesh Registration of Foreigners Act 1939, Bangladesh Passport Act 1920, Bangladesh Citizenship (Temporary Provision) Order 1972

do not cater to ‘refugees’ as defined under the 1951 Convention, thereby excluding them from any specific protection.⁸⁹ Moreover, Bangladesh’s internal displacement caused by climate-related events paints a grim picture. In 2019, Bangladesh saw an estimate of 4.1 million people being displaced as a result of climate events, and it is predicted that the country will see a population of 13.3 million people displaced by the year of 2050.⁹⁰

Bangladesh has signed various human rights conventions and is legally bound to protect the fundamental rights of its citizens without discrimination. To ensure the equal protection of all people from displacement, it is crucial for Bangladesh to adopt a national policy framework which fulfils the humanitarian obligations it has towards its people.

2.4.5. Nepal:

Nepal is not a party to the UNCSR or its Additional Protocol.⁹¹ Despite this, Nepal hosts nearly 20,000 refugees as of 2020, most of whom originate from Tibet and Bhutan.⁹² The domestic law of Nepal treats refugees as foreigners and has no action plan in place for the treatment and protection of refugees.⁹³

Like Bangladesh, Nepal has acceded various human rights treaties, including the ICCPR, however, the government has lacked in granting protection to refugees with standards set out by international law.⁹⁴ In a report published in 2020, it was noted that Nepal had violated the principle of non-refoulment when it arbitrarily deported Tibetan refugees to China.⁹⁵ Having

⁸⁹ Navine Murshid, ‘The politics of Refugees in South Asia: Identity, Resistance, Manipulation’, (2013) Routledge, 7

⁹⁰ Mizan R. Khan and Others, ‘High-density population and displacement in Bangladesh’ (2021) *Science*, Vol 6548, 1290-1293

⁹¹ UNHCR, (n71)

⁹² UNHCR, ‘Global Focus, Operation: Nepal’, (2020) <https://reporting.unhcr.org/nepal> accessed 24 august 2021

⁹³ Immigration Act 1992, 2 November 1992 (Nepal)

⁹⁴ Jolly and Ahmad, (n26) 142

⁹⁵ Universal Periodic Review (UPR), ‘Joint Submission by International Campaign for Tibet’ (2020)

no domestic law for refugees, Nepal relies upon its 1992 Immigration Act which does not contain provisions regarding refugees or asylum seekers.⁹⁶

From the context of climate change, and the warming of the glaciers in Himalayas, Nepal could see one of the worst impacts in the coming year in the form of extreme flooding and scarcity of food due to impacts on agriculture.⁹⁷ Even with the unavailability of figures of climate migrants within Nepal, it is reasonable to assume that the country is currently inadequate in its policies to protect climate refugees. As Nepal has repeatedly ignored its obligations under international legal frameworks for the protection of refugees and asylum seekers in its recent history, climate refugees will also face distraught with the absence of an efficient domestic framework.

2.5. Conclusion

This chapter concludes that the international and regional laws in place are inadequate to protect the challenge of climate refugees. Despite this, developments within international law could prove helpful. If effective, these developments would create channels for protection to climate refugees by bringing their legal protection to an international platform.

One such development can be seen within the principle of loss and damage, which already exists to cater to migration caused due to climate change. The next chapter will focus on this principle and what it entails. It will offer the principle as a legal framework to challenge the existing threat to climate refugees by examining its background, definition, and how it may be used in climate litigation.

⁹⁶ Ibid

⁹⁷ The World Bank Group and the Asian Development Bank, 'Climate Risk Country Profile: Nepal' (2021)

3. Loss and Damage

3.1. Introduction

Loss and damage has a long history in climate change policy making. The Alliance of Small Island States (AOSIS) called upon the UNFCCC at multiple COP occasions for assistance in tackling the impacts of climate change.⁹⁸ The plan for ‘insurance’ in cases of rising sea levels first made its way into climate change discourse in 1991.⁹⁹ The initial proposal put forward by AOSIS requested a loss and damage framework to help vulnerable countries to the impacts of climate change.¹⁰⁰ The proposal was rejected, and the UNFCCC focused its negotiations upon areas of mitigation and adaptation in the years which followed.¹⁰¹

The first time loss and damage was used within UNFCCC was during the Bali Action Plan, where a need for a mechanism addressing loss and damage due to disasters was addressed.¹⁰² However, the negotiations that follows posed serious challenges to the formal inclusion of the principle within the UNFCCC. Finally, during COP-18 in Doha, the advocacy for loss and damage carried out by Least Developed Countries (LDC) group gained significant traction.¹⁰³ Because of this, an official agreement was finally reached in 2013 during COP-19 resulting in the Warsaw International Mechanism (WIM) for Loss and Damage.¹⁰⁴

⁹⁸ Wil Burns, ‘Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change’ (2015) *ILSA J. Int’l & Comp. L.* 22, 419

⁹⁹ *Ibid*

¹⁰⁰ *Ibid*

¹⁰¹ United Nations, ‘United Nations Framework Convention on Climate Change’ FCCC/INFORMAL/84

¹⁰² UNFCCC, ‘Report of Conference of the Parties on its Thirteenth Session, Bali, 3-15 December 2007’ (2007)

¹⁰³ Julia Kreinenkamp and Lisa Vanhala, ‘Climate Change Loss and Damage’, (2017) Global Governance Institute

¹⁰⁴ UNFCCC, ‘Report of the Conference of the Parties on its Nineteenth Session, Warsaw, 11-23 November 2013’ (2013)

Another breakthrough was made when WIM was incorporated into the Paris Agreement, resulting in a substantive provision of loss and damage under Article 8 of the treaty.¹⁰⁵ Under the Paris Agreement, loss and damage entails the ‘cooperation and facilitation to enhance understanding, action and support’ through which states party to the treaty may ‘avert, minimize and address loss and damage’.¹⁰⁶

3.2. UNFCCC and WIM for Loss and Damage

Under the UNFCCC, the WIM is now the main provision which addresses loss and damage. It has three functions:

- Enhancing knowledge and understanding loss and damage and the ways to address it,
- Strengthening communication and coordination among stakeholders,
- Enhancing areas for support and action on loss and damage.¹⁰⁷

During COP-20 in 2014, nine action areas were set out for WIM’s two-year work plan which were to be led by an Executive Committee. These action areas cater to challenges caused by, but not limited to, climate change impacts in vulnerable countries, approaches to risk management, analysis of slow onset events, the challenges and approaches to migration and displacement, and development of a five year work plan.¹⁰⁸ However, due to disagreements about the composition of the Executive Committee, the two year work plan was not successfully carried out.¹⁰⁹ However, under the action plan of the Paris Agreement, WIM’s

¹⁰⁵ Morten Broberg and Romera Beatriz Martinez, ‘Loss and damage after Paris: more bark than bite?’ (2020) *Climate Policy*, Vol. 20, no. 6, 661-668

¹⁰⁶ *Ibid*

¹⁰⁷ Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts [2016] Adopted at the Fourth Meeting of the Executive Committee, Bonn, 19-23 September 2016.

¹⁰⁸ UNFCCC, WIM for Loss and Damage (2014) Forty-first session, Lima 1-6 December 2014, FCCC/SB/2014/4

¹⁰⁹ Climate Policy Observer, ‘Special COP 22: Marrakech to fine-tune the Loss and Damage Mechanism’ (2016)

framework was continued, and includes risk management and assessment, as well as a focus upon the displacement and migration caused by climate change.¹¹⁰

Moreover, the Executive Committee of WIM was requested to set up a taskforce on displacement during the COP-22, which reflects upon the urgency of the challenges of displacement caused by climate change in the future. The Executive Committee had been requested to work on developing approaches to ‘avert, minimize, and address displacement related to the adverse impacts of climate change.’¹¹¹

The inclusion of loss and damage is a positive step forward for the protection of climate refugees. However, loss and damage is a principle which is complex, and understanding what it entails is crucial to fill the gaps left in the climate change regime. The next section looks at how loss and damage has been defined, and the possibilities of protection within its boundaries.

3.3. Defining Loss and Damage

There are many ways in which loss and damage has been defined, and there is no universal definition for the term. Loss and damage is usually used for the ‘negative effects of climate variability and climate change’ to which people have been unable in adapting towards.¹¹² In the context of climate change, ‘loss’ entails the negative impacts which are irreparable.¹¹³ Loss and damage offers a distinct categorisation within the climate change regime by highlighting ‘non-economic losses’, which refer to the losses not traded in the market.¹¹⁴

¹¹⁰ United Nations Framework Convention on Climate Change (UNFCCC) (2016), Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. Forty-fifth session, Marrakech, 7 – 14 November 2016, FCCC/SB/2016/3

¹¹¹ United Nations Framework Convention on Climate Change (UNFCCC) (2015), Report of the Conference of the Parties on its twenty-first session, Paris, 30 November – 13 December 2015, FCCC/CP/2015/10/Add.1

¹¹² Warner and Others, ‘Evidence from the frontlines of climate change: Loss and damage to communities despite coping and adaptation.’ (2012) UNU-EHS 20

¹¹³ UNFCCC, ‘Background paper to the regional expert meeting on: A range of approaches to address loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset processes’

¹¹⁴ Olivia Serdeczny, ‘Non-economic Loss and Damage and the Warsaw International Mechanism’ (2019) Springer, Cham, 209

Examples of these include loss to freshwater resources, and the loss of culture or heritage which can be linked to population redistribution, as well as the loss of life.¹¹⁵ ‘Damage’ has been previously defined as negative impacts which can be repaired, for example, a damage to a property.¹¹⁶

Loss and damage has further been characterised by Gall and Kreft, according to whom it includes both the “economic and non-economic, tangible and intangible, as well as reversible and irreversible” consequences of climate change.¹¹⁷ These would include damages to infrastructure, residential properties, agricultural lands, habitat loss, and loss of life.¹¹⁸

It is important to distinguish loss and damage from adaptation, as ambiguity between the two terms may cause inconsistencies in analysing the legal framework in the climate change regime. According to a definition provided by Mechler and others, loss and damage is ‘residual’ to mitigation and adaptation, and is often referred to as the ‘beyond adaptation approach’.¹¹⁹ Loss and damage has also been defined in terms of risk and is used where the risk faced due to climate change is ‘intolerable’.¹²⁰ This is important from the context of climate refugees, who will face unprecedented challenges due to climate change, and may not have any other alternatives but to flee their homes.

Moreover, scholars have also distinguished between the two terms based on the degree to which an impact of climate change can be avoided. If an impact created as a result of climate change becomes unavoidable, and remedies to tackle and control the impact are impossible, it can be characterised as loss and damage.¹²¹

¹¹⁵ UNFCCC, 2016 (n110)

¹¹⁶ Ibid

¹¹⁷ Melanie Gall and Sonke Kreft, ‘Measuring what matters’, (2013) A Suitability Analysis of Loss and Damage Databases for the Climate Change Convention Process

¹¹⁸ Ibid

¹¹⁹ Mechler and others, ‘Loss and damage and limits to adaptation: recent IPCC insights and implications for climate science and policy’ (2020)

¹²⁰ Dow and Others, (n10) 13

¹²¹ Van der Geest & Warner, ‘Loss and damage in the IPCC Fifth Assessment Report’ (2015) *Climate Policy* 20(6) 731

From the discussion of the vulnerability of South Asia carried out earlier in this paper (Chapter 2.2), displacement of people in the region is highly likely. This would mean that a number of their rights, such as the right to life, right to healthy environment, and right to adequate standard of living will be at risk of violation. In many ways, their movement and migration will amount to ‘intolerable’ and ‘unavoidable’ risks of climate change, and so the potential of their legal protection should be analysed under the provision of loss and damage.

While the provisions within the Paris Agreement, including the principle of loss and damage do not legally bind states to protect climate refugees, cases in the past have used a human rights-based framework to approach loss and damage. To better offer recommendations for the protection of climate refugees within South Asia, the next section of this paper will look at ways in which the concept of loss and damage has been used in climate change litigation. With the help of some of the cases discussed below, I will look at how the principle of loss and damage may be used in aiding those displaced by the extreme impacts of climate change in South Asia.

3.4. Loss and Damage and Human Rights in Climate Change Policy

A human rights-based approach to climate change has gained traction owing to the Paris Agreement, which guides parties to the treaty to ‘respect, promote, and consider their obligations on human rights’,¹²² and asks Parties to make efforts in reducing the risk of loss and damage.¹²³

Although the Paris Agreement does not provide information on the implementation of a human rights framework to the action plans for climate change, the mere inclusion of a human rights does indeed provide a space for policy makers to advocate for its operationalisation. This is also evident from the annual report of COP-24, wherein the Taskforce of Displacement set up by the WIM’s Executive Committee, presented

¹²² Paris Agreement, 2015 (n9)

¹²³ Art 8, Paris Agreement, 2015 (n9)

recommendations regarding climate-induced displacement. The report invited Parties to work on policies for displacement, which would take into consideration ‘their respective human rights obligations and, as appropriate, other relevant international standards and legal considerations.’¹²⁴ Moreover, the inclusion of a human rights-based approach to UNFCCC’s efforts towards displacement has been gaining relevance as is supported by the work of various scholars and legal experts.¹²⁵

Established international institutions such as the European Court of Human Rights, and the African Court of Human and People’s Rights recognise and promote the obligation of states to respect, protect and fulfil the human rights of people within their jurisdiction.¹²⁶ While human rights obligations may have been recognised in the climate change regime, the application of human rights in addressing loss and damage remains low.¹²⁷ The reasons for this could be because states’ obligation to respect and fulfil human rights of individuals remains within the territory of their own jurisdiction, or as was proved by the prominent case of *Al-Skeini v UK*, the obligation can be at most extended to people under a state’s effective control.¹²⁸ This remains true even for the protection of human rights from private actors under a state’s jurisdiction.

Climate change cases have recently been gaining relevance in the domestic courts of states, and as is evident from *Luciano Lliuya v RWE AG*, significant development within climate change law are taking place which can potentially hold private companies responsible for damages caused due to its GHG emissions.¹²⁹ Cases which hold states responsible for failing to protect their human rights from the impacts of climate change have also been successfully dealt with in the recent past. A prominent example from South Asia is the case of *Asghar*

¹²⁴ Patrick Toussaint and Adrian M. Blanco, ‘A human rights-based approach to loss and damage under the climate change regime’ (2020) *Climate Policy* 20(6) 750

¹²⁵ *Ibid*

¹²⁶ Florentina Simlinger and Benoit Mayer, ‘Legal responses to climate change induced loss and damage’ (2019) Springer, Cham, *Loss and Damage from Climate Change*, 183

¹²⁷ *Ibid*

¹²⁸ *AL-Skeini and Others v United Kingdom* [2011] European Court of Human Rights, Application no. 55721/07

¹²⁹ *Luciano Lliuya v RWE AG* [2015] Essen Regional Court

Leghari v Federation of Pakistan wherein the High Court of Lahore recognised that there had been a delay from the Pakistani government in implementing a climate change adaptation framework.¹³⁰

This proves that states can indeed be held accountable for their failure to protect fundamental human rights from the impacts of climate change. However, they do little to compensate and aid in cases of loss and damage. For climate refugees, human rights law can pave the way forward. The next section of the paper will look at some of the prominent cases which have linked climate change and human rights, and offer ways forward for the climate change regime.

3.5. Loss and Damage and Climate Litigation

There has been ambiguity surrounding climate change litigation, with regards to whether the cases concern adaptation and mitigation, or loss and damage. To determine this characterisation, Toussaint has provided a typology based on two key elements. These relate to the ‘harm’ caused, and the claimant’s objective.¹³¹ According to Toussaint’s study, climate change cases will fall under loss and damage if the harm has already taken place, and if the claimant’s primary objective for filing a case is to seek remedies for the harm occurred. An example of this is the prominent case of the *Native Village of Kivalina v ExxonMobil Corporation*, where residents of the village of Kivalina filed a complaint against energy corporations for the loss of their land, and sought remedies for their relocation.¹³²

Similarly, in *Comer v Murphy Oil*, plaintiffs sought compensation for their damaged properties, and alleged that the oil company remained responsible for the increase in global warming which led to Hurricane Katrina.¹³³

¹³⁰ *Asghar Leghari v Federation of Pakistan* [2015] Lahore High Court

¹³¹ Patrick Toussaint, ‘Loss and Damage and Climate Litigation: The Case for Greater Interlinkage’ (2020) *Review of European, Comparative & International Environmental Law* 30.1, 16-33

¹³² *Native Village of Kivalina v ExxonMobil Corp* [2012] United States District Court for the Northern District of California

¹³³ *Comer v Murphy Oil USA*, [2009] United States District Court, S.D Mississippi

Other influential cases have linked human rights in climate change litigation, especially referring to the right to an adequate environment. In 2015 the *Urgenda Foundation v State of the Netherlands* was the first judgement of its kind which resulted in a government having to adopt a more effective approach to reducing their GHG emissions.¹³⁴ Similarly, *Future Generations v Ministry of Environment and Others* is another noteworthy case brought against the Colombian government, where plaintiffs argued that their right to food, health, life, water, and a healthy environment were being violated as the government had done little to prevent deforestation of the Amazon.¹³⁵ One of the more recent and landmark cases was brought forward in the United States where a District Court Judge upheld the right to an adequate environment as a fundamental right.¹³⁶

The potential for a human rights-based approach to fill the legal gaps in the climate change regime has previously been acknowledged.¹³⁷ It has also been argued that the human rights-based approach to loss and damage in climate change litigation will also offer claimants to take on an ‘active’ role in areas which concern their fundamental rights.¹³⁸ It is no doubt that the response to climate change is strengthened by a human rights based approach. The Special Rapporteur on human rights and migration has stated that ‘public policies with respect to climate-change induced migration should be guided by a general respect for the dignity and human rights of the affected individuals, groups and communities..’.¹³⁹

¹³⁴ *Urgenda v Federation of the Netherlands* [2019] District Court of The Hague

¹³⁵ *Future Generations v Ministry of Environment and Others* [2018] Supreme Court of Colombia

¹³⁶ *Juliana v United States Case* [2016] District Court for the District of Oregon

¹³⁷ See for example, Annalisa Savaresi and Juan Auz, ‘Climate change litigation and human rights: pushing the boundaries’ (2019) *Climate Law* 9(3) 244-262

¹³⁸ Morten Broberg and Hans-Otto Sano, ‘Strengths and weaknesses in a human rights-based approach to international development’ (2018) *International Journal of Human Rights*, 664-680

¹³⁹ Francois Crepeau, ‘Human rights of migrants (report by the special rapporteur on the human rights of migrants, 13 august 2012)’ UN Doc A/67/299 para 51

Moreover, the right to an adequate environment has also been analysed to argue that obligations under this right would strengthen commitments of the parties under the Paris Agreement as the treaty has a role to play in preventing displacement.¹⁴⁰

¹⁴⁰ Walter Kalin, 'Conceptualizing climate-induced displacement' (2010) Mahanirban Calcutta Research Group, 81

3.6. Conclusion

The above discussion is a strong argument for the benefits of the inclusion of a human rights-based approach to loss and damage as it relates to climate refugees. With the advent of climate change-related cases that have been brought to courts in recent history, legal protection gaps are now more visible than ever. This poses serious challenges for countries who are least responsible for their contribution to climate change, and yet will be affected most by its impacts.¹⁴¹ These include the vulnerable states in South Asia, as mentioned in Chapter 2 of this paper.

Those at risk of being displaced due to the impacts of climate change must be taken into consideration, as states have an obligation to take measures to protect the rights of those who are susceptible to environmental harm.¹⁴² The next part of this paper is the last chapter of the analysis for the protection of climate refugees in South Asia. It will look into the national climate policies of the region, and analyse any space for the application of the principle of loss and damage. Through this analysis, I look at state practices that provided, or failed to provide protection to those seeking protection from the impacts of climate change. I will then look at the potential of loss and damage as a framework of legal protection of climate refugees in South Asia.

¹⁴¹ Human Rights Committee, Resolution A/HRC/RES/10/4

¹⁴² John H Knox, 'Linking human rights and climate change at the United Nations' (2009) *Harv. Envtl. L. Rev.* 33, 20

4. Loss & Damage, Climate Refugees, and Climate Litigation in South Asia

4.1. Introduction

As discussed in Chapter 2 of this paper, the refugee policies in South Asia require drastic changes and revisions to increase their ability for the protection of refugees. South Asia is heavily marred by political tensions, for example those which have recently resulted from the takeover of Taliban in Afghanistan, and the persisting hostilities between India and Pakistan.¹⁴³ This political insecurity creates many challenges when analysed from the context of climate refugees, who have not so far been formally recognised as refugees under international law.

The protection of refugees has been recognised as a principal mandate under the UNHCR, as well as the principles of the UN Charter.¹⁴⁴ Although this protection has not been extended to climate refugees, it is still important to acknowledge that underlying principles of human rights protection have been applied for the protection of refugees in the past. As discussed in Chapter 3, developments within climate change litigation are a positive indicator for the protection of climate refugees. This chapter will now focus on refugee protection practices of South Asian judiciaries as they relate to climate change and the environment. Through this, it discusses the implications of such practices from the lens of loss and damage. This chapter will contribute towards a potential of climate refugee protection which can find its place in the legal gaps left in international law.

4.2. State Practices

¹⁴³ Victoria Schofield, 'Kashmir in Conflict: India, Pakistan and the unending war' (2021) Bloomsbury Publishing

¹⁴⁴ UNGA Elaboration of a Draft Convention on Territorial Asylum (adopted 9 December 1975) A/RES/3456; UNGA report of the United Nations High Commissioner for Refugees UN GAOR 30th Session Supp No 12 UN DOC A/10012 (1975)

International legal frameworks are focused on the broader effects of climate change such as sea-level rise, challenges for food and water supply.¹⁴⁵ Due to this, an effective climate justice system for vulnerable countries such as those in South Asia is missing. As the impacts of climate change result in the creation of refugees, the existing international legal framework is inadequate in offering protection to the multifaceted issues which refugees will face. While the legal gap in international climate regime has been acknowledged, it is also important to note that academics in the past have emphasized on climate litigation as a helpful tool in working for climate justice.¹⁴⁶

As discussed in Chapter 3 in the case of *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment*, observations made by the courts are of a significant value to climate litigation. It therefore offers potential for the future that the protection of climate refugees may be granted under the Convention provided the complaint meets the thresholds set out by the provisions.

Cases which have dealt solely on climate refugees or climate displacement have been scarce. The discourse on climate refugees focuses greatly upon the normative debate, as well as key aspects required which make it difficult for climate refugees to be granted protection under the Convention. However, as seen from examples discussed so far, climate litigation is moving forward with claims about violation of human rights. This has also been seen in South Asia, where environmental protection has been recognised within the constitutions of states.

Perhaps, this implementation could be strengthened with the WIM for loss and damage, which has been incorporated into the Paris Agreement to which the five South Asian countries under discussion are parties to. It is this angle of the climate regime that I will now turn to, and offer a close examination in light of the principle of loss and damage, and human rights law in being able to provide protection to climate refugees. To begin this analysis, I

¹⁴⁵ David Free Stone, 'United Nations Framework Convention on Climate Change- The Basis for the Climate Regime', (2016) *The Oxford Handbook of International Climate Change Law* (OUP 2016)

¹⁴⁶ See for example, Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49

will first turn to national state practices of South Asia, which are specific to climate change and the environment.

4.2.1. Afghanistan:

Data on the implementation of environmental laws in Afghanistan, and climate change litigation is not readily available, and this indicates one of the limitations of this paper. However, the inclusion of Afghanistan in the discourse of climate change is crucial. As has been discussed in sections above, the negligence of refugee movements created as a result of instability in Afghanistan will have consequences for the entire region. Therefore, it is of absolute necessity that further climate change policies keep Afghanistan in focus when establishing frameworks for protection for climate refugees.

4.2.2. Pakistan:

The judiciary of Pakistan has applied the right to life under the Constitution of Pakistan in several cases dealing with the environment. Previously, the Supreme Court of Pakistan held that under Article 14 and Article 9 of its constitution, the right to life could collectively entail the access to adequate food, clothing, shelter, as well as a clean environment.¹⁴⁷

Much like the rest of South Asian states, cases which specifically deal with climate and the environment have been rare in the country. One exception of this was the landmark case of *Asghar Leghari v. Federation of Pakistan* which has been discussed in earlier chapters. Another example is the case of *Sheikh Asim Farooq v. Federation of Pakistan*, in which the court ordered the government of Pakistan to fulfil their obligations to protect forests, citing the National Climate Change Policy of 2012.¹⁴⁸

This proves that domestic courts have favoured a transformation within the climate change regime, at least in part, which would move towards a framework granting climate change justice. However, the issue of climate refugees has remained absent.

¹⁴⁷ *Shehla Zia and Other vs WAPDA* [1994] Supreme Court of Pakistan PLD SC 693

¹⁴⁸ *Sheikh Asim Farooq v Federation of Pakistan* [2018] Lahore High Court

4.2.3. India:

The right to a clean environment was included as a fundamental right in India after the prominent case of *Maneka Gandhi v Union of India*.¹⁴⁹ India saw further development within its climate litigation when the National Green Tribunal (NGT) was established by the country's parliament to oversee issues and challenges which citizens faced due to environmental concerns.¹⁵⁰ The NGT applies the international principles of environmental law, including the precautionary, and the 'polluter pays' principles.¹⁵¹

One of the more significant cases that have been brought before the NGT related to climate change has been the *Ridhima Pandey v UOI and CPC* wherein the complainant argued that the government had failed in its duty to mitigate the adverse impacts of climate change.¹⁵² This case also highlighted the existence of climate refugees, which the complainant argued had been displaced in India, stressing that such displacement had further implications for the economy of the country.¹⁵³ The case also found that a response strategy to such displacement could possibly include a collaborative network among the countries of Global South and the Global North to tackle the challenges of climate-induced displacement.¹⁵⁴

The case was dismissed in 2019, on the grounds that climate change was already covered in the national policies of India. However, it has set an important precedent within climate litigation in India, and elsewhere in the countries of South Asia. One can expect that where Indian courts have favoured a human-rights based response to climate change and refugees, the same would be extended to the cases involving climate refugees within South Asia.

¹⁴⁹ *Maneka Gandhi v Union of India* [1978] Supreme Court of India

¹⁵⁰ Gitanjali Nain Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' [2016] 5(1) TEL 175-205

¹⁵¹ National Green Tribunal Act (2010) India

¹⁵² *Ridhima Pandey v Union of India* [2017] National Green Tribunal

¹⁵³ Ibid

¹⁵⁴ Ibid

4.2.4. Bangladesh:

The prominent case of *Farooque v. Government of Bangladesh* brought the acknowledgement of the right to a clean environment as a part of a fundamental right to life.¹⁵⁵ To further the country's climate litigation framework, Bangladesh established the Environment Court Act of 2010, which applied environmental laws as they were defined by Bangladesh's Environment Conservation Act of 1995 to claims brought forward by its citizens.¹⁵⁶ While this is a significant development towards climate justice, it provides little comfort to complainants as they first have to prove their grievances through an inspection report carried out by the Department of Environment (DoE).

Data on climate litigation in Bangladesh as it relates specifically to climate refugees is scarce, and not readily available. It has thus not been mentioned in this section. This paper acknowledges this as a gap in the climate regime of South Asia.

4.2.5. Nepal:

Nepal's government observed that the right to a clean and healthy environment constituted the right to life under article 11 of its Constitution.¹⁵⁷ It has also adopted international principles of environmental protection, including sustainable development, precautionary principle and polluter pays principle. The Court has in the past also favoured the 'public interest', noting that the private interests must not cause harm to the public because of their impacts on the environment.¹⁵⁸

In a more landmark case which is directly related to climate change, the complainant filed a case against the Nepalese government demanding for a new climate change law. *Shresta v. Office of the Prime Minister et al.*, argued that the existing Environmental Protection Act of 1997 was inadequate, and as a result the government of Nepal had violated the right of life

¹⁵⁵ *Farooque v Government of Bangladesh* [1995]

¹⁵⁶ *Environment Court Act* (2010) Bangladesh

¹⁵⁷ *Suraya Prasad Sharma Dhungel v Godavari Marble Industries and others* [1992] Supreme Court of Nepal

¹⁵⁸ *Advocate Prakash Mani Sharma v Cabinet Secretariat* [1997] Supreme Court of Nepal

granted to the citizens under its Constitution.¹⁵⁹ As a result, the Supreme Court of Nepal ordered the government to enforce changes in its climate policies, and called for an implementation of new climate change law.¹⁶⁰ Because of the decision by the Supreme Court of Nepal, the government introduced the Environment Act of 2019, and the Forests Act of 2019.¹⁶¹

4.3. Applying Loss & Damage to South Asia's Climate Litigation for the Protection of Climate Refugees

Keeping under consideration the right to life granted by the Constitutions of South Asian states, and the implications for the right to a healthy environment, any harm caused to people and communities by the impacts of climate change is a violation of the right to life. With the projected estimations of displaced people by climate change in the coming decades, any negligence on part of the South Asian governments is also a violation of this right, as the right to life entails the measures to mitigate 'foreseeable' threats, as identified under case the General Comment No. 36.¹⁶²

Loss and damage is a growing area of the climate change regime. With uncertainties and confusion surrounding the legal nature of the principle, it is still up for debate as to the extent of protection it could offer climate refugees. While WIM has been incorporated within article 8 of the Paris Agreement, its legal application is up for contention. This article does not give rise to liability and compensation.¹⁶³ Hence, this could discourage climate-related complaints to be filed based on loss and damage. However, the rising prominence of climate litigation around different parts of the world are a reflection of the gaps in the legal system which provide protection against the impacts of climate change. This is where loss and damage has to intervene to offer respite to those seeking protection from displacement. Loss and damage

¹⁵⁹ *Shresta v Office of the Prime Minister et al.* [2017] Supreme Court of Nepal

¹⁶⁰ Ibid

¹⁶¹ Environment Act 2019; Forests Act 2019, Nepal

¹⁶² GC No. 36, ICCPR (n49)

¹⁶³ Art 52, Paris Agreement Decision 1/CP.21

is therefore a significant step towards the protection of climate refugees, as it also entails non-economic losses.

When talking about displacement, non-economic losses faced due to climate change are of the same importance as any other cause of a refugee or migratory movement. From the perspective of a human rights based approach to climate refugees, this principle can thus take center stage to protect fundamental rights such as the right to life, the right to be free from torture or degrading treatment.

Loss and damage has previously been discussed from the perspective of small island states. Indeed, it was because of the efforts of the AOSIS that a framework on loss and damage was established.¹⁶⁴ However, there has been no framework which links the principle of loss and damage to the South Asian context. In this regard, the plight of South Asian states and their vulnerability to the adverse impacts of climate change has been ignored in the wider climate change discourse.

In the previous chapters, this paper discussed the socio-political instability of South Asia, and its implications for climate refugees. It should be stressed that any discussion about climate change as it relates to South Asia is at risk of being overshadowed by political and socioeconomic challenges in the region. This is exactly why it is critical to discuss a framework which protects climate refugees in South Asia. In this regard, this paper has offered a human rights-based approach to loss and damage as a framework for legal protection to climate refugees.

This chapter has shown the rising trends of climate litigation in South Asia, and the subsequent observations made by South Asian judiciaries which have upheld fundamental rights as defined under international law. Additionally, loss and damage has been discussed in detail as the principle entails protection of people from the impacts of climate change, including the effects of migration, and protection from non-economic losses. While the provision is not legally binding, this chapter has proposed that loss and damage be

¹⁶⁴ UNFCCC, 2011b, 27

approached from a human rights-based lens. When applied to climate litigation, this interlink could prove to be instrumental in the protection of climate refugees.

4.4. Ways Forward

The critique of the application and implementation of WIM for loss and damage is valid. However, it is important to examine it as a starting point for the protection of refugees. The development of this principle, for example in ways which make the principle at least partially legally binding, is what will create space for legal protection for climate refugees in South Asia. Customary international law also has a role to play in the protection of climate refugees. As discussed from the case of *Luciano Lliya v RWE AG*,¹⁶⁵ companies are finally being held accountable for their impact to livelihoods. This is important to look at from the context of climate refugees, as the risks posed to right to life for climate refugees are enough to grant them protection.

An effective resettlement policy within the climate change regime needs to be discussed in the present discourse. Additionally, South Asia could benefit from a collaborative network, such as SAARC, wherein climate policies and protection of climate refugees are discussed and revisions in environmental laws are made. Any negligence on this is also a violation of the right to life of climate refugees.

Courts in South Asia have favoured the right to life in the past in terms of climate change and the environment. This has already set a precedent which shows that the right to life will be protected in the future. However, the absence of a legal framework poses serious challenges to effective implementation of policies for climate refugee protection. To fill this gap, loss and damage can guarantee rights of climate refugees if it is operationalised successfully within international and domestic laws.

¹⁶⁵ *Luciano Lliya v RWE AG* [2015] (n129)

5. Conclusion

The latest IPCC report confirms the risks and challenges countries will face due to climate change in the coming years. South Asia's vulnerability to climate change means that a significant population of people will be displaced, and migration patterns due to climate change will be both internal, and across borders. The current legal frameworks under international and domestic laws have proved to be inadequate to cater to the advent of climate refugees in South Asia.

Upon close examination of the provisions within international law, the principle of loss and damage stands out as one possible solution to offer protection to climate refugees. Its inclusion of non-economic losses, and special attention to climate migration makes it a significant contribution to the climate change regime. While it is a non-binding principle, it can be applied using a human rights-based approach. The development of climate litigation in both international and domestic practices shows that a human rights-based approach has worked effectively towards the protection of people who have been harmed due to climate change.

With the analysis carried out of domestic practices of South Asia as they relate to climate change, this paper has proposed that the principle of loss and damage has great potential to offer respite to climate refugees in South Asia. However, more development in this field is needed to work out how loss and damage can be operationalised within climate litigation. If the climate change regime focuses on this, it could prove substantial in granting a legal status and protection to climate refugees across the world.

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