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TRANSBOUNDARY CLIMATE-INDUCED MIGRATION: THE NEED FOR A LEGALLY BINDING INTERNATIONAL FRAMEWORK AND A DISPUTE SETTLEMENT MECHANISM

Abstract

Transboundary Climate Migration ('TCM') is projected to become an increasingly disconcerting consequence of climate change, with human settlements being displaced erratically. The absence of an international legal regime that systematizes such migratory patterns has the potential to worsen the impacts of climate change on marginalized climate migrants, especially those hailing from the Global South. While multiple suggestions have been made as to the nature of an instrument regulating TCM, these need to be comparatively analysed on the basis of feasibility, efficiency, and adherence to the imperative of 'international cooperation' to determine the most appropriate apparatus. Moreover, given that disputes involving nation-states and climate migrants are a foreseeable likelihood, the next important enquiry lies in the type of dispute resolution mechanism that the legal apparatus for regulating TCM should opt for. While the International Court of Justice ('ICJ') possesses broad powers in resolving international disputes, including certain landmark environmental disputes, does it have the capacity to delve into fact-intensive and time-sensitive disputes emanating from TCM? If not, how suitable can arbitration be in resolving TCM disputes efficiently?

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Keywords

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Introduction

The Sixth Assessment Report of the Intergovernmental Panel on Climate Change ('IPCC') observed that Extreme Weather Events ('EWEs') such as wildfires, floods, and droughts, *inter alia,* are highly likely to result in detrimental impacts on agriculture, forestry, and fishery activities.[1] While these events are projected to encompass the entirety of human settlements around the world, some areas will be more impacted owing to the multiplicity of occurrences of these events.[2] In the light of these projections, the report has further strengthened the assertion that climate change-induced displacement is a foreseeable consequence of extreme transformation in the global climatic system. A 2021 *Groundswell* report on climate migration predicted that climate change will lead to the internal displacement of 216 million people in six world regions that are specifically vulnerable to climate change including parts of Africa, Asia, and Europe.[3] More alarmingly, the IPCC Assessment Report pinned the figure at one billion with respect to people who will be exposed to coastal-region vulnerability and endangered liveability by

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[1] IPCC, 2022: *Climate Change 2022: Impacts, Adaptation, and Vulnerability,* Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Technical Summary B 2.3), p. 48, available at: https://www.ipcc.ch/report/ar6/wg2/ [last accessed 06.5.2024].

[2] *Ibid.,* p. 48.

[3] Migration Data Portal, *Environmental Migration*, available at: https://www.migrationdataportal.org/themes/environmental_migration_and_statistics#recent-trends [last accessed 06.5.2024]; United Nations General Assembly, Report of the Special Rapporteur on the Human Rights of Migrants A/77/189, 2022, p. 4, available at: https://documents.un.org/doc/undoc/gen/n22/431/49/pdf/n2243149.pdf?token=tjSe9w4DHTxYVjm77b&fe=true [last accessed 06.5.2024]; IPCC 6th Assessment Report of the Working Group, Poverty, Livelihoods and Sustainable Development 2022, p. 1225, available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter08.pdf [last accessed 06.5.2024].

2050.[4] Also, 3.3 billion people live in regions which have been identified as highly vulnerable to the impacts of climate change.[5] While displacement due to climate change is expected to be largely within the borders of a nation-state, the possibility of transboundary displacement has not been ruled out. Transboundary climate migration ('TCM') can be an efficient adaptation strategy if receiving nation-states are accommodative of climate migrants. Moreover, it will become inevitable when the inhospitability of entire countries will be exacerbated with the passage of time when climate change will lead to substantive shifts in climatic regions. At the same time, such migration can pose a great risk if the receiving states are hostile, and their hostility is exacerbated by no safeguard for the migrants under international law.

With no convention addressing TCM explicitly in a holistic manner, there have been attempts to compartmentalize the management of TCM in conventional international law paradigms. These paradigms include international refugee law, international human rights law, international environmental law, *inter alia*. Moreover, an emphasis has been observed on feasibility and the high likelihood of success of regional arrangements vis-à-vis international arrangements for managing TCM. The multiplicity of explorations for addressing TCM necessitates a comparative scrutiny to propose a legal instrument which can best address TCM with a component of time-bound global acceptability.

Formulation of an appropriate legal instrument forms the first stage of setting the normative framework to be quickly followed by a second enquiry about enforceability. International legal instruments have been flexible in offering multiple avenues for dispute resolution, including litigation and alternative dispute resolution mechanisms. However, with respect to the legal instrument addressing TCM, selecting an appropriate dispute resolution forum is vital for the addressal of time-sensitive *en masse* migratory incidents, application of expertise, *locus standi*, and accessibility-transparency nexus. This compels an examination of relative advantages of litigation at the ICJ and a modified model of international arbitration for best ensuring that the management of TCM is holistically promising, in terms both of laying down the normative

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[4] Migration Data Portal, *supra note* 3.

[5] IPCC 6th Assessment Report of the Working Group, *supra note* 3, p. 1174.

framework and of implementation through dispute resolution, with maintaining a central focus on the circumstances of climate migrants.

In this paper, Part I contextualizes the issues through a literature review of various propositions for the first-stage problem of appropriate legal framework and approaches for TCM management. Further, it also briefly delves into the niche area of viability of arbitration in addressing climate change problems in general, which will form the basis for the paper's subsequent discussion on narrowing down its feasibility to TCM disputes. Part II conducts a critical and comparative analysis of the attributes of FMAs regime, Global Compact for Safe, Orderly and Regular Migration ('Global Compact'), and the UNFCCC to adjudge the most suitable instrument for governing TCM. Part III analyses two primary adjudicatory mechanisms - ICJ and arbitration - that can be incorporated into the instrument governing TCM to ensure the speedy, accessible, and fair resolution of disputes that will involve climate migrants and signatory states as major stakeholders. Further, after justifying the viability of arbitration as a suitable forum for dispute resolution, this part delves into the enquiry of how arbitration can be made a more viable and efficient dispute resolution method *vis-à-vis* the accountability and prompt relief to climate migrants. A conclusion follows the discussion.

I. Outlining Contemporary Scholarly Discussion on the Appropriate TCM Legal Instrument and Suitable Dispute Resolution Forum

With regard to the appropriate legal regime that can incorporate TCM management, the 1951 Refugee Convention is one of the foremost instruments that must be analysed to determine its scope *vis-à-vis* climate migrants. Scholars have sidelined the application of the Convention for two primary reasons. *Firstly,* the definitional parochiality of a 'refugee', which is broadly restricted to victims of persecution, outrightly excludes any scope to incorporate and safeguard the interests of climate migrants under international refugee law (IRL). The definition of 'refugee' has been criticized for its parochial scope whereby it is highly individualized and has thereby led to an emphasis on personal causality rather than general causality affecting multiple people in identical circumstances (such as

civil war).[6] *Secondly*, the terms 'persecuting' state and 'host' state cannot fit into the climate migration discourse, where the state from where one emigrates can itself be construed as a victim of climate change.[7] Moreover, TCM exhibits certain distinctive attributes that have confounded policymakers in proposing a suitable new legal regime for its regulation.

Jane McAdam in *Climate Change, Forced Migration and International Law* propounded at least five attributes to avert the suggestion of a new 'climate refugee' treaty, some of which merit special note.[8] Primarily, climate change cannot be treated as a standalone factor that can stimulate a decision to migrate. As also observed by the IPCC[9] and other scholars[10], climate change can be a significant push factor in transboundary migration, but it is usually coupled with other political, economic, and social considerations. This creates a preliminary problem of setting a yardstick of who shall be referred to as a 'climate refugee'. Secondly, there can be a counterproductive consequence where other forced migrants may be subordinated to climate migrants without any justifiable dichotomy, and result in compromise or the former's deprivation of international aid and assistance.[11]

However, Biermann and Boas have questioned the reluctance of some scholars to acknowledge the urgency of climate migration, such as McAdam and others, who have problematized the distinctive attributes of climate migrants.[12] Biermann and Boas attach a significance to

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[6] B. Mayer, F. Crépeau, *Research Handbook on Climate Change, Migration and the Law,* Edward Elgar 2017, pp. 96-96.

[7] R. Kuusipalo, *Exiled by Emissions – Climate Change Related Displacement and Migration in International Law: Gaps in Global Governance and the Role of the UN Climate Convention,* "Vermont Journal of Environmental Law", Issue 18, 2017, p. 624.

[8] J. McAdam, *Climate Change Forced migration and International Law*, Oxford University Press 2012, p. 187.

[9] IPCC, 2022: *Climate Change 2022: Impacts, Adaptation, and Vulnerability,* Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Chapter 6- Cities, Settlements and Key Infrastructure 2022, p. 929, available at: https://www.ipcc.ch/report/ar6/wg2/ [last accessed 06.5.2024].

[10] E. Piguet, F. Laczko, *People on the Move in a Changing Climate, Regional Perspectives on Migration, The Environment and Climate Change*, Springer 2014, p. 2.

[11] J. McAdam, *supra note* 8, p. 187.

[12] F. Biermann, I. Boas, *Climate Change and Human Migration: Towards a Global Governance System to Protect Climate Refugees, Hexagon Series on Human and Environmental Security and Peace,* Springer-Verlag Berlin Heidelberg 2012, p. 292.

climate 'refugees' identical to that attached to refugees who escape political persecution and are thus covered under the ambit of the Refugee Convention.[13] They further endorsed five principles that should be taken into consideration while deliberating upon a *sui generis* TCM management.[14] An emphasis has been put on the planned resettlement of climate migrants given that TCM is predictable, unlike other violent and spontaneous conflicts such as war.[15] Moreover, climate migrants from different regions should be perceived as a collective group of people (as opposed to the emphasis given to individual persecution in IRL), displaced by an identical causative factor so that the regime accommodating them is customized as per their original state of habitation.[16]

Additionally, underscoring the international responsibility to manage TCM, Biermann and Boas call for international aid, especially from the Global North, to assist the developing nation-states to resettle the displaced communities efficiently within their territories if feasible. They also highlighted the favourable applicability of the principles of Common but Differentiated Responsibilities ('CBDR') and reimbursement by developed nation-states in the form of hosting climate migrants.[17] Such resettlement should be permanent because of the perpetual inhospitability of the regions that climate migrants escape. Procedurally, they propose establishment of an executive committee for carrying out planned relocation by inviting states to identify vulnerable regions and seeking scientific opinion for appropriate solutions, *inter alia*.[18] On this note, Francis has identified some climate migration push factors that are noteworthy - migration due to devastating Extreme Weather Events ('EWEs'); escape from gradual degradation such as perpetual water scarcity in the environment of a place, submergence of coastal areas[19]; low lying island nation-states endangered by rising sea level; vio-

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[13] *Ibid*.

[14] *Ibid*., p. 295; B. Mayer, F. Crépeau, *supra note* 6, p. 411.

[15] C. P. Carlarne, K. R. Gray, R. Tarasofsky, *The Oxford Handbook of International Climate Change Law*, Oxford University Press 2016, p. 531.

[16] F. Biermann, I. Boas, *supra note* 12, p. 295.

[17] *Ibid*.

[18] B. Mayer, F. Crépeau, *supra note* 6, p. 414.

[19] B. Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, "Colorado Journal of International Environmental Law and Policy", Issue 22, 2011, p. 363.

lent conflicts emanating from lack of living resources such as potable water, land, shelter, and food.[20]

Rina Kuusipalo advocates modifying the international environmental law ('IEL'), primarily the United Nations Framework Convention on Climate Change ('UNFCCC') to incorporate TCM governance. Kuusipalo reasons that IEL can be imperative given the core principles of CBDR, equity, responsibility and "common responsibility, and shared obligation of states for the global commons"[21] that can create a conducive environment of cooperation among states affected by climate migration.[22] Kuusipalo uses these principles in forming a causative link between climate migration and the aggregate of nation-states that have been major emitters of Greenhouse Gases ('GHGs'), to make possible a cooperative mechanism of compensation and action. This could provide an opportunity to govern TCM cooperatively, using the "soft-law" notions of accountability, by taking into account the circumstances of the climate migrants, their origin state and destination state, and could be a better recourse than litigation in courts.[23]

Certainly, the applicability of international human rights law ('IHL') has been explored as well, with the justification that TCM is in all likelihood an issue involving the basic human rights of climate migrants.[24] Siobhan Lankford outlines principles of IHL such as non-discrimination, no-harm principle, migration with dignity, *inter alia,* and elaborates on the obligations of States to respect, protect, and fulfil human rights with respect to climate migrants.[25] These obligations in the TCM context entail obligations focussed on curbing contribution to climate change through greenhouse gas emissions, incorporating humane migratory policies in national adaptation frameworks, being actively involved in addressing TCM, and agreeing upon a legal instrument for TCM management itself.[26] Also, Lankford proposes a particular IHL feature, i.e.,

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[20] A. Francis, *Climate-Induced Migration & Free Movement Agreements,* "Journal of International Affairs", Issue 73, 2019, p. 124.

[21] R. Kuusipalo, *supra note* 7, p. 627.

[22] *Ibid.*, p. 616.

[23] *Ibid.*, p. 627.

[24] B. Mayer, F. Crépeau, *supra note* 6, p. 133.

[25] *Ibid.*, pp. 131-168.

[26] Ibid., p. 159.

'vertical' and 'horizontal' enforcement wherein in the former, a state can be held accountable by climate migrants, in the present context, situated within the territory and in the latter, states could hold other states accountable for violating human rights by failing to fulfil their obligations under the principles outlined earlier.[27]

Pertinently, Kent and Behrman observe that the majority of climate change-linked litigation has involved arguments based on principles of IHL, within which a right of non-refoulement and complementary protection have been mainly used.[28] In *Teitiota*, a landmark case addressed by the Human Rights Committee ('CCPR') involving TCM, a citizen of Kiribati used these principles for seeking refugee status in New Zealand. While CCPR rejected the plea, and stated that the plaintiff's status was not special *vis-à-vis* other citizens of Kiribati, the Committee opined that climate change could violate human rights by depriving people of the right to live with dignity.[29]

Francesco Ippolito expands the debate on IHL applicability by reading in the principle of "ecological vulnerability" for bridging the gap between TCM and enforceability through IHL. The approach eases establishment of causality for 'forced' TCM by emphasizing accounting for the general deterioration of living conditions in the country of origin due to climate change, thereby exposing communities to human rights vulnerability.[30] This interpretation of the principle of non-refoulement marks a nexus between IHL and IRL, and could have been a decisive factor in the *Teitiota* case. The expansive interpretation enabled by 'ecological vulnerability' would also justify the application of non-refoulement in TCM owing to the indirect deterioration in socio-economic liveability in the state of origin, rather than establishing a direct causality through a sudden disaster.[31]

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[27] *Ibid*., p. 142.

[28] S. Behrman, A. Kent, *Climate Refugees: Global, Local and Critical Approaches*, Cambridge University Press 2022, p. 363.

[29] D. A. Serraglio, F. Capdeville, F. Thornton, *The Multi-Dimensional Emergence of Climate-Induced Migrants in Rights-Based Litigation in the Global South*, "Journal of Human Rights Practice", Issue 1, 2024, p. 9.

[30] F. Ippolito, *Environmentally Induced Displacement: When (Ecological) Vulnerability Turns Into Resilience (and Asylum)*, "International Journal of Law in Context", Issue 20, 2024, p. 75.

[31] *Ibid*., p. 77.

Deviating from the approach of using interpretative techniques to address TCM through existing international law frameworks, some scholars vouch for a regional agreement model, whereby, instead of an international convention, the regions can provide for a cooperative arrangement of accommodating climate migrants from their region among themselves. This can be beneficial given the cultural homogeneity.[32] Ama Francis promotes Free Movement Agreements ('FMAs') among regions for accommodating and integrating regional climate migrants in party nation-states that have not been at the receiving end of climate change-induced disruptive events.[33] However, as Mayer observes, regions that are the most exposed to the vagaries of climate change are also the poorest.[34] This fact poses a hindrance to the success of regional mechanisms, as it will effectively lead to a deterioration in the situation of climate migrants in poorer regions, with well-developed regions abdicating responsibility to accommodate them. Therefore, Mayer suggests that TCM should be handled keeping in view the responsibility of the international community towards climate migrants.[35] Mayer caveats that regionalism in managing TCM, and the Global North's ignorance, could further exacerbate the consequences, with various other conflicts emanating from TCM.[36]

Assuming that a legal instrument governing TCM is adopted by the international community, the efficacy of opting for a suitable dispute resolution forum is equally important if the process of migration is to possess efficient management, cooperation, and promptness. The suitability of ICJ as an adjudicatory forum has been supported by some authorities, highlighting its procedural clarity, choice to seek expert advice, and other legal remedies.[37] Moreover, judicial forums are not restricted in their mandate, and can take into consideration other factors such as community interests, which can be imperative in case of climate migration.[38] However, the fact that only States and not individuals can

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[32] A. Francis, *supra note* 20, p. 128.

[33] *Ibid*., p. 126.

[34] B. Mayer, *supra note* 19, p. 374.

[35] *Ibid*., p. 375.

[36] *Ibid*., p. 378.

[37] C. P. Carlarne, K. R. Gray, R. Tarasofsky, *supra note* 15, p. 426.

[38] C. H. Bower II, *Max Planck Encyclopedias of International Law*, Oxford University Press 2007, p. 91.

be legitimate parties in ICJ disputes[39], the lack of experts as adjudicators, and the substantial focus on questions of law rather than questions of facts[40] can be detrimental in TCM disputes as has been analysed further in this paper.

The International Chamber of Commerce's (ICC) special report on exploring the viability of arbitration in climate change disputes recognised its benefits in the context of investor-state disputes. The report stressed the easier accessibility and flexibility, the availability of expert arbitrators for complex dispute matters, and realistic time-frames.[41] The customizability of arbitration has been highlighted by the drafting of the 'Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment' ('the Optional Rules') by the Permanent Court of Arbitration ('PCA'). In fact, the UNFCCC provides for arbitration as a dispute resolution mechanism for disagreements arising between the party states.[42] Risteard de Paor recommends PCA as the most appropriate forum for climate change dispute resolution owing to its perception of neutrality and capacity for considering non-environmental aspects of climate migration, which would be noticeably absent if a special 'international environmental tribunal' were created.[43]

TCM can lead to a plethora of inter-state disputes if the international legal regime does not lay down regulatory mechanisms that will ensure the accommodation of climate migrants rather than their marginalization. However, the moot question that remains unaddressed is: which international legal tool will be best suited to meet the urgency of managing TCM. Will a regional agreement, or FMAs as suggested by Francis, best accommodate climate migrants? Or will a global agreement provide a more promising and responsible migratory solution and guarantee the international cooperation that is needed from the Global North? How feasible would a global agreement turn out to be in the

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[39] R. Verheyen, C. Zengerling, *The Oxford Handbook of International Climate Change Law*, Oxford University Press 2016, p. 4.1.

[40] R. Kolb, *The International Court of Justice*, Bloomsbury Publishing 2014, p. 304.

[41] International Chamber of Commerce, *Resolving Climate Change Related Disputes through Arbitration and ADR*, 2019, p. 19.

[42] United Nations, United Nations Framework Convention on Climate Change 1992, Art. 14(2)(b).

[43] R. Paor, *Climate Change and Arbitration: Annex Time before there won't be A Next Time*, "Journal of International Dispute Settlement", 2016, pp. 36-37.

light of anti-immigrant domestic policies being adopted by the Global North nation-states?

In the realm of resolution of disputes arising from TCM, the legal instrument governing it will also have to ensure that climate migrants are incorporated in the resolution proceedings so that they are not marginalized from the adjudicatory process. Would these concerns be adequately addressed by the ICJ or an arbitral tribunal? How can the arbitration proceedings be modified in a manner that TCM is managed transparently, by keeping the climate migrants informed and providing them with an opportunity to explain their circumstances if it is chosen as the appropriate forum?

II. FMAs, Global Compact, or UNFCCC: What Should Govern TCM?

The genesis of legal uncertainty surrounding climate migrants is found in the lack of an international legal instrument that categorically governs TCM. The gravity of international disagreement is prominent in a debate surrounding the nomenclature itself, which is a contest primarily between 'climate refugee' and 'climate migrant'. The International Organization for Migration (IOM) recorded this nomenclature debate in one of its publications, namely *Migration and Climate Change*, stating that climate refugee is an unfit term.[44] The primary argument posited is that climate change is predicted to contribute to internal displacement that will not involve crossing borders; therefore, the term refugee cannot be used to refer to such individuals.[45] Additionally, reiterating the reason given by McAdam, using the term *refugee* to address individuals who are displaced by climate change can potentially lead to a dilution in the term's usage with respect to individuals who escape political persecution as per the 1951 Refugee Convention.[46]

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[44] IOM International Organization for Migration, *Migration and Climate Change*, 2008, pp. 13-15.

[45] *Ibid.*, p. 14.

[46] *Ibid.*, pp. 13-15.

However, it is relevant to note that this debate whittles down the exigency of TCM. By emphasizing the impracticality of setting out factors on which climate refugees would be identified, the debate signals that definitional parochiality is an inevitable requirement if TCM is to be governed efficiently under an internal legal instrument. This assumption is rebuttable given that such parochiality need not exist in the first place. Since it is accepted that climate change can form part of a multicausal decision to migrate, a climate migrant can be characterized by the multiple causes that emanate from climate change, with the latter being the primary causative factor. In most cases, climate migrants will make the decision to migrate because of minimization in economic and social opportunities along with uncertainty about the future prospects of the place which has been affected by climate change, either through EWEs or through gradual climate processes[47] such as soil salination, capricious precipitation pattern, *inter alia*. Discriminating against climate refugees by terming their causes for migration as less persecutory than refugees escaping political persecution can be viewed as unjustifiable. Both types of refugees need to be considered equally significant, without hierarchizing the causative factors of each stream of migration.

1. The FMAs Regime

Proceeding to the suggestion by Francis for regulating TCM through FMAs, it is crucial to note that free movement regimes already exist across several regions. Some of the notable FMAs include the ones that established the EU, ECOWAS, CARICOM, and IGAD *inter alia*. However, these have been created rather for promoting regional integration and economic development than for specifically relocating or providing alternative opportunities to climate migrants.[48] An exceptional case is the Australia-Tuvalu *Falepili* Treaty which recently materialized. As per the agreement, Australia is obliged to establish a "special human mobility

[47] *Ibid*., p. 17.

[48] T. Wood, *The Role of Free Movement Agreements in Addressing Climate Mobility*, "Forced Migration Review", 2022, p. 62, available at: https://www.fmreview.org/climate-crisis [last accessed 06.5.2024].

pathway" for enabling inhabitants of Tuvalu to migrate to Australia for livelihood and other purposes, given the threat of statelessness of Tuvalu due to climate change.[49] The workability of this treaty is circumstantial. It means that this regional arrangement is an exception because of the geographical proximity of a developed state and a developing state. The norm remains that such regional arrangements include countries of similar levels of development, etc. So, the circumstance of geographical proximity makes this treaty *prima facie* workable. Therefore, an exception given that Australia is the only developed country which has entered into such an arrangement with a jeopardized small-island state nation, apart from the fact of their geographical proximity.

For the purpose of dissecting the suitability of an FMA for managing climate migration, the FMA model of the Intergovernmental Authority on Development (IGAD) has been identified for the purpose of this paper. The IGAD model is specifically interesting because of the fact that it is an eight-country trade bloc consisting of African Countries located in the Horn of Africa and the Nile Valley, which are regions identified as especially vulnerable to climate change. Thus, examining the provisions of an FMA concerning a region that is not resilient to climate change has the potential to present the workability of an FMA when it comes to TCM management, as opposed to the exceptional case of the *Falepili* treaty.

Article 3 of the Protocol on the Free Movement of Persons in the IGAD Region ('The Protocol') provides for three primary rights to the citizens of member countries – the right to free movement (including the right of entry, stay, and exit), the right to employment, and the right of residence. It also provides for the recognition of the necessities of individuals 'with specific vulnerabilities'.[50] This could have incorporated the category of individuals who are fleeing their homes owing to de-

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[49] Australian Government, Department of Foreign Affairs and Trade, Art. 2(1) and 3(1), Australia-Tuvalu Falepili Union treaty, available at: https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty [last accessed 06.5.2024].

[50] Office of the Executive Secretary IGAD Secretariat, Republic of Djibouti, Art. 3(7), Protocol on Free Movement of Persons in the IGAD Region 2020, available at: https://environmentalmigration.iom.int/sites/g/files/tmzbdl1411/files/event/file/Final%20IGAD%20PROTOCOL%20ENDORSED%20BY%20IGAD%20Ambassadors%20and%20Ministers%20of%20Interior%20and%20Labour%20Khartoum%2026%20Feb%202020.pdf [last accessed 06.5.2024].

struction caused by EWEs. However, the specific vulnerabilities have been identified in Article 13 which recognises women at risk, unaccompanied children, elderly individuals, *inter alia*. The protocol is progressive in allowing identical employment and social security benefits to a citizen of another member country in a host member country.[51] Relevantly, Article 16 provides for special protection for individuals who are affected by disasters, to include extended stay, and the exercise of the same rights as are given to a citizen of the host country in case of disasters.[52]

While mass expulsion of non-citizens from the host country is prohibited[53], the grounds for individual expulsion can prove to be hostile.[54] The valid grounds for expulsion include a threat to "public policy, public security, public order, or public health" of the host member state. TCM stimulated by EWEs can lead to mass displacement and if the population of these climate migrants pose a threat to the above-mentioned attributes of the host state that can be widely and arbitrarily interpreted, the FMA can become a non-feasible TCM governance instrument. Given the wide ambit of terms that justify expulsion, even increasing competition for employment and livelihood, shelter and food due to the migration of individuals displaced by EWEs, can lead to their expulsion or *refoulement* in refugee terms. This could make climate migrants vulnerable again with no hospitable environment owing to loss of basic living and livelihood conditions in their origin nation-state.

Tamara Wood argues that the IGAD model can still be construed as a progressive FMA that can at least temporarily accommodate individuals displaced by disasters, unlike other FMAs, where the arrangement is suspended in case of disasters.[55] However, even that is debatable, as displacement and inflow of climate migrants in the host state itself could be interpreted as a threat to public security, which could further justify expulsion. Wood highlights another concern: FMAs usually permit entry of individuals across the member state borders on the basis of certain documentation requirements. However, in the case of

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[51] *Ibid*., Articles 8, 9 and 10.
[52] *Ibid*., Art. 16.
[53] *Ibid*., Art. 19.
[54] *Ibid*., Art. 20.
[55] T. Wood, *supra note* 48.

disasters including those induced by climate change, it is not unreasonable to foresee the impossibility of furnishing citizenship proof or other documents, if they have been destroyed in an EWE.[56] Even if TCM is not induced by an EWE, but in the anticipation of a deterioration in the quality of life in the origin region, such as lower yield of crops due to soil salination or unpredictable weather patterns, *inter alia*, the requirement of citizenship proof will remain crucial and inevitable if TCM is managed through an FMA. This is owing to the fact that an FMA will provide the benefits of free movement only to citizens of party member states. But this raises a pertinent question as to how reasonable it is to impose an obligation to prove one's national identity in the face of displacement due to climate change-induced events. Given that TCM is not going to be confined to a specific region and it can be caused by unpredictable events in unanticipated regions, TCM management should not emphasise identity proof, but proof of the cumulative conditions that have caused such migration.

In *Free Movement Zones: Guide for Issuance and Border Management*, a Free Movement Zone ('FMZ') has been characterized on multiple criteria, but some are of specific interest with regard to discussion on the suitability of an FMA for TCM management. An FMZ requires a high level of mutual trust among the party states and a similar level of institutional development especially in the area of law.[57] It is also restricted to countries that are contiguously situated.[58] These pre-requisites of creating an FMZ, if replicated in an FMA that is specifically made for regulation of climate migrants, can be counterproductive. It is not difficult to discern that the impacts of climate change are not restricted to certain countries or regions. In the case of IGAD for instance, the eight member countries are situated in the Horn of Africa. The Horn of Africa has been experiencing multiple droughts over the years that have been continuously exacerbated by climate change.[59] The regional impact of a cli-

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[56] Platform on Disaster Displacement, *The Role of Free Movement of Persons Agreements in Addressing Disaster Displacement: A study of Africa*, 2019, p. 30.

[57] IOM International Organization for Migration, Free Movement Zones: Guide for Issuance and Border Management 2021, p. 28.

[58] *Ibid*.

[59] F. Harvey, Human-driven climate crisis fuelling Horn of Africa drought – study, *The Guardian,* 2023, available at: https://www.theguardian.com/environment/2023/

mate change-induced EWE superimposes the geographical contours of countries that are part of IGAD. This creates a situation where the FMA fails to manage TCM due to droughts given that all the party states are struck with the same disaster and thus, the climate migrants are not left with an option to migrate to a safer place if the FMA is in operation.

Additionally, it is also argued that FMAs can provide social security benefits to the climate migrants along with other rights identical to those of the citizens of the host state such as the right to education and healthcare.[60] While such empowerment would be done in good faith, a practical drawback in the case of TCM *en masse* can be the overburdening of vital institutions of the host state. If the origin state is permanently made inhospitable, thereby making the return of climate migrants a practical impossibility, the host state will be obliged to provide for a collective group of climate migrants under the FMA which will overburden the social security mechanisms. While TCM *en masse* will have a significant impact on these systems of any number of countries even if an FMA were not governing TCM, the situation could become graver in the case of a regional arrangement due to a high concentration of climate migrants in an unimpacted host state(s) within the region, rather than distribution among different unimpacted states across the world.

Another concern about FMAs lies in the fact that such an arrangement does not acknowledge the causative factors behind any kind of movement. The general outlook towards migration along with an invariable bestowing of rights on migrants underplays the urgency and special attention that TCM requires. While FMAs, in general, are instruments to encourage regional integration, free movement, and economic development (at least in the case of the multiple FMAs in Africa)[61], TCM is a phenomenon that requires special provisions that ensure that climate migrants are safely and harmoniously integrated into the host state's society by specifically taking into account the causative factor of

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apr/27/human-driven-climate-crisis-fuelling-horn-of-africa-drought-study [last accessed 06.5.2024].

[60] A. Francis, *Free Movement Agreements & Climate-Induced Migration: A Caribbean Study*, "Sabin Center for Climate Change Law, Columbia Law School", 2019, p. 17, available at: https://scholarship.law.columbia.edu/sabin_climate_change/62 [last accessed 06.5.2024].

[61] Platform on Disaster Displacement, *supra note* 56, p. 20.

climate change. A necessity of special protection for climate migrants that ensures their adaptation to the environment of the host state without the impractical and inhumane option of expulsion is glaringly absent in an FMA that focuses on the "effects" of movement rather than its "causes".[62]

Proponents of FMAs as a feasible solution to manage TCM, such as Francis, refute the suggestion of a new global convention on TCM, reasoning that linking a case of migration with climate change can be a difficult task as climate change cannot be the sole driver of TCM.[63] While climate change can contribute to forming the decision to migrate, such migration is simultaneously also induced by relevant socio-economic and political factors.[64] Another reason flagged against the proposal of a new agreement is the political incapacity to introduce, and non-feasibility of introducing such an agreement. This has been further substantiated in recent times amidst the strong anti-immigrant wave that has engrossed major Global North actors such as the UK, EU, and USA, *inter alia*.[65]

2. The Global Compact and UNFCCC

In this context, it is crucial to note that the Global Compact was aimed at introducing an international legal regime for underpinning *all categories* of migration with respect for the human rights of international migrants. It has some progressive principles, including a pledge to avoid haphazard migration or migration as an "act of desperation"[66]. It further

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[62] A. Francis, *supra note* 60, p. 21.

[63] *Ibid*.

[64] *Ibid*., p. 20.

[65] D. Leonhardt, *The Global Immigration Backlash,* "The New York Times", 2023, available at: https://www.nytimes.com/2023/07/11/briefing/global-migration.html [last accessed 07.5.2024]. See L. Norman, T. Fairless, *As Migration to Europe Rises, a Backlash Grows,* "Wall Street Journal" 2023, available at: https://www.wsj.com/world/europe/as-migration-to-europe-rises-a-backlash-grows-72a758fb [last accessed 07.5.2024].

[66] United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, General Assembly Resolution 73/195, 2018, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_73_195.pdf [last accessed 07.5.2024].

emphasizes centring migration policies around people and calls for international cooperation in managing transboundary migration.[67] However, its non-binding nature has rendered it a dead letter given that all these principles have been repeatedly violated by multiple countries, right from the case of preventing migrants from entering the UK for asylum by undertaking dangerous English Channel crossings, to the hardening of the southern border of the US.[68]

Many scholars such as Biermann and Boas, also suggest incorporating governance of climate migration under the already existing international legal instruments, such as the UNFCCC and the Paris Agreement, which are specifically dedicated to building international cooperation on climate change mitigation and adaptation. It is critical to note that UNFCCC has acknowledged the historical responsibility and culpability of developed nation-states in contributing to anthropogenic climate change. It has also recognised the vulnerability of Global South countries to the impacts of climate change and their inefficient adaptative mechanisms. Article 3(2) obliges the member-states to take into account the "specific needs and special circumstances" of the developing parties and their especially adverse circumstances in adapting to the detrimental impacts of climate change.[69] Article 3(3) also obliges the member-states to conduct efficient planning for the purpose of managing, "minimizing", and handling the consequences of climate change-induced events.[70] This obligation should be performed by conceding to the variation in socio-economic circumstances of each party nation-state. Article 4(4) reiterates the commitment of developed nation-states in assisting developing member states exposed to the detrimental consequences of climate change to cope with the resultant havoc.[71] The significance of this provision in embodying the imperative of governing TCM has also been identified by Benoit Mayer.[72] The UNFCCC has also recognised

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[67] *Ibid*., p. 15.

[68] The Migration Observatory, University of Oxford, *People crossing the English Channel in small boats,* 2023, available at: https://migrationobservatory.ox.ac.uk/resources/briefings/people-crossing-the-english-channel-in-small-boats/ [last accessed 07.5.2024].

[69] United Nations, United Nations Framework Convention on Climate Change, 1992, Art. 3(2).

[70] *Ibid*., Art. 3(3).

[71] *Ibid*., Art. 4(4).

[72] B. Mayer, *supra note* 19.

countries with specific attributes that are to be given special consideration while framing policies related to climate change adaptation and mitigation.[73] Most of these categories of countries are characterized by their vulnerability to the impacts of climate change.

To address specifically the problem of TCM, the 2010 Cancun Agreements acknowledged using TCM as an effective adaptation strategy without mechanizing it. Lack of detailing has been indicative of an aversion towards creating targeted obligations of the state, particularly with respect to the Global North countries.[74] Similarly, the Paris Agreement emphasizes the need to enhance the capacity to adapt to climate change.[75] It also creates an obligation on the part of developed party nation-states to assist and aid the developing party nation-states in increasing their capacity to enhance resilience against climate change.[76] The principles that are inbuilt in UNFCCC, the Cancun Agreements, and the Paris Agreement are broadly aligned with the imperative of the special responsibility of the Global North to ensure that the Global South is not left unassisted while coping with the pernicious effects of anthropogenic climate change. This broad principle was contextualized by Biermann and Boas to suit the case of TCM where they argued for the "international burden-sharing" of climate migrants on the lines of the CBDR principle used in climate mitigation.[77]

One of the issues regarding the governance of TCM through the UNFCCC and the Paris Agreement remains the broad and principle-based characteristics of these conventions. These treaties cannot be effectively used to regulate TCM without introducing specific provisions or annexures that specifically lay down the principles that will govern TCM. In fact, Biermann and Boas vouch for a protocol for managing climate migration to the UNFCCC itself, namely the *Protocol on Recognition, Protection, and Resettlement of Climate Refugees*, given the umbrella nature of the latter for regulating all types of disputes pertaining to cli-

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[73] United Nations, United Nations Framework Convention on Climate Change, 1992, Art. 4(8).

[74] B. Mayer, F. Crépeau, *supra note* 6, p. 196.

[75] United Nations, United Nations Framework Convention on Climate Change, *The Paris Agreement*, 2015, Art. 2(1)(b).

[76] *Ibid*., Art. 11(3).

[77] F. Biermann, I. Boas, *supra note* 12, p. 295.

mate change.[78] Another drawback, however, is the non-binding nature of these conventions which has the potential to make developed member states abdicate their responsibility under the specific rules if made. The problem also reveals a concerning complication where, even when the obligations under UNFCCC are not binding, an aversion towards imposing specific obligations on Global North for TCM management has been evident.

Significantly, a 'Draft Convention on the Status of Environmentally Displaced Persons' provides a rights-centric approach for guaranteeing environmentally displaced people ('EDPs'), which may include climate migrants, temporary harbour in another party state in line with IHL.[79] The instrument lays down an elaborate system for recognition of EDPs, to avail rights mentioned in the convention such as the right to travel, to be rescued, to have a livelihood, *inter alia*, through an application-based initiation in the respective National Commission for EDPs.[80] An appellate authority[81] and Global Environmental Displacement Agency[82] have also been proposed for ensuring global compliance. While the instrument is elaborate, a problem is identifiable with respect to the timely disposal of applications by the National Commissions, while it is laudatory that temporary residential permits will be given with all rights under the Convention guaranteed.[83] Moreover, the Convention documents the principle of CBDR in fulfilling the obligations, without explaining how Global North countries, in case of TCM, will fulfil their compounded obligations under CBDR. Also, the basis on which applications can be rejected has not been mentioned, so creating the possibility of disproportionate rejections by Global North countries. Even if there is an appellate authority for reviewing such rejections, the concern of timely disposal remains unaddressed. Also, the convention does not emphasize the planned relocation component which is important in TCM

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[78] *Ibid*.

[79] International Centre for Comparative Environmental Law, *Draft Convention on the International Status of Environmentally-Displaced Persons*, 2013, Article 1, available at: https://cidce.org/wp-content/uploads/2016/08/Draft-Convention-on-the-International-Status-on-environmentally-displaced-persons-third-version.pdf [last accessed 07.5.2024].

[80] *Ibid*., Articles 16 and 17.

[81] *Ibid*., Articles 18 and 22.

[82] *Ibid*., Article 21.

[83] *Ibid*., Article 16(2).

management; contrarily, it has provided for the return of EDPs after the origin state regains its stable environmental conditions.[84]

3. The Sustainable Instrument?

The above analysis strengthens the case against FMAs as a viable international legal arrangement for managing TCM, given the practical possibilities of failures due to regionally affecting EWEs or climate processes, the non-specific nature of regulating migration, and the proclivity to suspend the FMA in the face of "public order" or natural disasters, *inter alia*. Similarly, the Global Compact cannot be deemed a suitable instrument owing to its general and non-binding nature which downplays the urgency and special recognition of TCM as an eminent form of migration. Additionally, given the political incapacity and non-feasibility of introducing a specific international convention on the regulation of TCM, modification of the UNFCCC by incorporating TCM-specific regulations can be a tenable mechanism to manage TCM. While curating these regulations, the rights of EDPs as enumerated in the Draft Convention can be chosen as foundation for contextualizing the human rights of climate migrants.

These regulations should provide for *binding responsibilities* of the Global North countries, under the overarching principle of CBDR, wherein they are obliged to integrate climate migrants from the Global South countries as part of planned relocation as well as sudden disaster emanating from climate change. This retributive justice model, based on the principle historical responsibility for causing climate change, will ensure that climate migrants from the Global South are not excluded from the international climate change adaptation scheme, which is a grave possibility in FMAs where regional hierarchy may leave the most marginalized climate migrants unaccounted for. Rather than fitting in TCM management in conventional areas of international law, these regulations could ensure incorporation of these principles in the context of TCM. For instance, the principle of non-refoulement as contextualized in IHL, through the component of 'ecological vulnerability'

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[84] *Ibid.*, Articles 1 and 12.

by Ippolito, can be included in this framework to give the regulations a multi-disciplinary approach and create multiple levels of protection for climate migrants. Such an exercise will potentially sideline the requirement for interpretation which can lead to unpredictable decisions, as in *Teitiota,* thereby prejudicing the issue-sensitivity of TCM.

Moreover, an emphasis on planned relocation which is a major proposition by the Nansen Initiative, should form a part of these regulations.[85] For effective adaptation strategy, there should be an incremental and non-chaotic relocation of vulnerable communities. The UN Special Rapporteur also recommended this, drawing a link between the right to live with dignity, as contextualized in TCM matters, which requires planned relocation.[86] This would also distinguish these regulations from conventional IRL and IHL which emphasize urgent and grave violations as grounds for claiming rights under these legal frameworks. By providing for planned relocation, climate migrants will be able to argue as collective groupings[87] for claiming their right to be relocated as an adaptation obligation of the party-states, without establishing any individualized form of causality.

Most importantly, these provisions should be enforceable and subject to redressal by an adjudicatory mechanism to prevent the abdication of the responsibility and obligation which are due to the climate migrants on the part of the potential host states. Significantly, the amenability of the parties to subject themselves to a binding set of regulations can be dependent on the dispute resolution forum adopted. The adversarial and punitive nature of dispute resolution needs to be avoided while dealing with an issue as contemporarily alarming as TCM for ensuring cooperation and voluntary involvement so that the best possible solution for TCM management in specific instances is achieved. Also, this choice would be decisive while considering the factors of accountability and transparency which should ideally be a consideration

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[85] The Nansen Initiative, *Agenda For The Protection of Cross-Border Displaced Persons In The Context Of Disasters And Climate Change Volume I*, pp. 36-39, available at: https://disasterdisplacement.org/wp-content/uploads/2014/08/EN_Protection_Agenda_Volume_I_-low_res.pdf [last accessed 07.5.2024].

[86] United Nations General Assembly, Report of the Special Rapporteur on the Human Rights of Migrants, *supra note* 3, p. 21.

[87] B. Mayer, F. Crépeau, *supra note* 6, p. 411.

in planned relocation strategy.[88] The debate on adopting a suitable adjudicatory mechanism is spearheaded in the following section where litigation in the ICJ has been comparatively analysed with the scope of arbitration in the light of quick, accessible and substantive enforcement of the proposed obligations under the UNFCCC.

III. ICJ or Arbitration: Resolution of TCM Disputes

As outlined in the conclusion of the previous part, dispute resolution will be another important aspect while creating the international regime for governing TCM. The arrangements observed earlier, such as those which UNFCCC provides for flexibility in dispute resolution mechanisms, give equal importance to litigation and arbitration (and other alternative dispute resolution mechanisms). Since the Global Compact is non-binding and is centred around creating norms, no particular dispute resolution mechanism has been prescribed.[89] With respect to the compartmentalization of TCM in the conventional international law area of IHL, the dispute resolution form remains CCPR which is a form of litigatory resolution. Interestingly, with respect to IRL, other modes of dispute resolution, which will include arbitration, *inter alia,* are given preference over litigation in the ICJ. Given the diversity in dispute resolution mechanisms in different legal mechanisms, a second-stage enquiry into what type of TCM disputes can arise and how they can be best resolved, under the proposed set of regulations, is necessary.

There can be multiple situations that can potentially lead to disputes, with two primary scenarios being *disputes between State-Parties to a legal instrument that will govern TCM,* and *disputes between a potential host state and the climate migrants.* The former category of dispute can have various causes, not least the disagreement on whether the host state has the capacity to support the climate migrants, whether the origin state has undertaken satisfactory steps to narrow down the possibility of TCM, or

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[88] The Nansen Initiative, *supra note* 85, p. 39.

[89] Global Compact for Migration, *Global Compact for Safe, Orderly and Regular Migration*, 2018, available at: https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf [last accessed 07.5.2024].

what is the extent of the host state under the CBDR principle to harbour climate migrants from Global South origin states. The other category of disputes i.e., between climate migrants and the host state can arise primarily on humanitarian grounds such as against expulsion by the host state on ambiguous grounds of "public security", "public order", *inter alia*, if such provisions are embodied in the legal instrument that will govern TCM. The climate migrants can also invoke the CBDR principle to argue that the host state is under an obligation to accommodate them (either through planned or sudden disaster-induced relocation) given the grave living conditions prevailing in their origin state due to the detrimental impacts of climate change to which the Global North has contributed massively.

On a comparison between these two disputes, the type of dispute between the host state (mostly, a Global North member state) and the climate migrants who seek refuge in the former, can be more consequential given that the direct victims of TCM will demand accountability and solution from the countries who are primarily responsible for exacerbating the impacts of climate change. The host states will find it harder to rebut the claim with a robust defence, given the direct human rights concerns and humanitarian grounds involved. In the case of disputes involving the host state and the origin state, the host state will be vested with the potential defence of divesting itself of any responsibility by casting aspersions on the conduct of the origin state in curbing the possibility of TCM itself through the adoption of robust adaptation structures.

1. The ICJ and Other Litigation Options

In this context, the next pertinent question that arises is what type of dispute resolution mechanism will be best suited to redressing the grievances of climate migrants, host states, and origin states. Beginning with an analysis of the capacity of the ICJ to adjudicate on these disputes, it is noteworthy that Article 34 (1) of the ICJ statute states that only states can be legitimate parties that can file for resolution of the dispute before the ICJ.[90] Article 14(2)(a) of the UNFCCC has vested the ICJ with the author-

[90] United Nations, Statute of the International Court of Justice, 1945, Art. 34(1).

ity to resolve disputes that arise from the Convention.[91] This forms one of the reasons for the non-feasibility of ICJ as a correct forum for adjudicating disputes involving TCM. The inaccessibility of ICJ vis-à-vis the victims of TCM transforms ICJ into a redundant forum, especially if the origin state is not amenable to represent the climate migrants in the ICJ under the *parens patriae* principle.

The ICJ's track record on environmental disputes has been mixed. One of the disappointing decisions by the ICJ was in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.[92] The ICJ sidelined the environmental aspect of nuclear weapons proliferation and usage on the grounds that the environmental aspect could not deprive the states of their right to self-defence.[93] Additionally, the positivist character of this decision was reflected in an observation by the Court that substantiated the non-environmental character of nuclear weapons proliferation on the grounds that International Environmental Law ('IEL') did not specifically prohibit such proliferation.[94] Similar positivism may hinder progressive adjudication on environmental disputes, given the need to expand and interpret textual IEL to make it more suitable for complex disputes such as TCM management. The lack of exhaustive climate change jurisprudence in ICJ is indicated in a recent advisory opinion reference made to the ICJ by the UN General Assembly regarding the obligations of States under the heads of mitigation and adaptation strategies.[95] The choice of using advisory jurisdiction can be partly construed as reflective of lack of commitment of seeking binding directions from ICJ, which is perhaps a significant drawback of this forum. However, it can be an affirmative development as it has the potential to lay down foundational principles for climate change dispute resolution, which can be narrowed down to TCM disputes in future cases.

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[91] United Nations, United Nations Framework Convention on Climate Change, 1992, Art. 14(2)(a).

[92] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, p. 226.

[93] *Ibid*., p. 30.

[94] *Ibid*., p. 33.

[95] International Court of Justice, *Obligations of States in Respect of Climate Change*, 2023, p. 2, available at: https://www.icj-cij.org/case/187 [last accessed 07.5.2024].

In the case of an exhaustive agreement set in place, such as the Statute of the River Uruguay signed between Uruguay and Argentina, the ICJ interpreted the provisions exhaustively.[96] Additionally, Justice Cançado Trindade also discussed the general principles of IEL and applied them to the dispute at hand.[97] This characterizes the ICJ as a vital institution that can adjudicate on IEL; however, the limited number and variety of cases that finally reach the ICJ can slow down the entire interpretation process.[98] Moreover, in the environmental disputes resolved by the ICJ to date, it has been limited to adjudication on the broad principles of IEL rather than delving into the specificities of various environmental disputes, rights, and obligations of the states, a process that may hinder the development of ICJ jurisprudence on TCM management.[99]

The treatment of individuals as "minors" in case of grievance redressal under international law has been justified on the basis that an international court such as the ICJ cannot be open to resolving "private" disputes of individuals. However, in the case of TCM, it can be argued that the plight of a collective group of climate migrants can be given the status of a public dispute which could have been brought (had Article 34(1) been non-existent) directly by a representative of these migrants, in a case in which the involved states are not amenable to seek recourse from the ICJ.[100] Thus, the emphasis on the narrowness of parties to an ICJ

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[96] *Case Concerning Pulp Mills on the River Uruguay, Argentina v. Uruguay, ICGJ 425 (ICJ 2010),* Part IV.

[97] *Ibid*., Separate Opinion of Judge Cançado Trindade, Part VII.

[98] A. McMillan, *Time for an International Court for the Environment,* International Bar Association, available at: https://www.ibanet.org/article/71b817c7-8026-48de-8744-50d227954e04 [last accessed 07.5.2024]: *"A specialist Chamber for Environmental Matters created by the ICJ in 1993 did not have one environmental dispute referred to it before it was disbanded in 2006. As Linehan notes, '"state responsibility" and the "no harm" principles have been important ideas in general international law for decades, yet the ICJ has had a very limited opportunity to consider them in the context of states' climate change obligations'"* (emphasis supplied). See International Bar Association, Climate Change Justice and Human Rights Task Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruption Report,* 2014, p. 34, available at: https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04 [last accessed 07.5.2024].

[99] M. Fitzmaurice, *The International Court of Justice and International Environmental Law, The Development of International Law by The International Court of Justice,* Oxford University Press 2013, p. 374.

[100] R. Kolb, *supra note* 40, p. 259.

dispute without considering the nature of the dispute, which may be of utmost international community importance, creates a preliminary hurdle for climate migration dispute adjudication. While there are strong arguments for restricting the criteria for legitimate parties in the ICJ, it equally makes it an unsuitable forum for adjudicating disputes involving climate migrants directly. The problem is not restricted to the exclusion of individuals from approaching the ICJ for dispute resolution; even international organizations cannot legitimately avail themselves of the provision for contentious proceedings.[101] This has been criticized on the ground that such exclusion has not kept up with the increasing importance of international organizations in the international fora.[102]

Poma Poma v. Peru[103] is an important case while discussing the entitlement of climate migrants to hold host states accountable in TCM disputes that will be absent in the ICJ. The case was heard by the CCPR which is vested with the responsibility of implementing the ICCPR.[104] The key question in this case was whether a state policy such as river-water diversion and the emanating environmental degradation could impact the cultural rights of a minority under Article 27 of the ICCPR. The CCPR held in the affirmative stating that the state was supposed to take prior consent of the cultural minority impacted and provide reparations if the project was undertaken.

This case is intriguing primarily for two reasons. *Firstly*, the adjudicatory mechanism where a private party was able to initiate proceedings against the state is laudatory: it can lend strong support to a similar mechanism for TCM management. *Secondly,* the CCPR is not only an adjudicatory body, but also keeps track of how the states have been faring in enforcing ICCPR, and so can also contribute to forcing states to comply with ICCPR requirements in times of violations. This can be an effective mechanism for TCM management which may require the host states to comply with their responsibility for integrating and providing harbour to climate migrants.

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[101] *Ibid*., p. 271.

[102] *Ibid*., *p*. 272.

[103] *Ángela Poma Poma v. Peru*, Comm. 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (HRC 2009).

[104] United Nations General Assembly, General Assembly Resolution 2200A (XXI), *International Covenant on Civil and Political Rights*, 1976, Articles 28, 40 and 41.

The ICJ gives primacy to the question of law and the facts that are crucial in determining such a question. Questions of fact that are not related to the application of a legal norm are not taken into account by the ICJ.[105] Additionally, ICJ decisions are framed within the contours of international legal instruments according to Article 38 of the ICJ statute, which includes the practice of horizontal *stare decisis*.[106] However, in cases such as those involving TCM, the restricting of decision formation to set international law principles and precedents can deprive the disputes of a conducive environment for forming new principles that match the circumstances of each situation and are not restricted to questions of law. TCM may involve questions of fact that may not be interpreted as relevant to questions of law such as the historical contribution of a host state to anthropogenic climate change, or the extent of uninhabitability of the origin state. These require enquiries that are crucial in determining how the climate migrants can be accommodated. Furthermore, TCM presents a new area of law with meagre international law jurisprudence, which creates a problem for the ICJ because it cannot, ideally, venture into policy-making if the provisions of the legal instrument are not exhaustively clear.[107] Therefore, for a legal instrument to be implemented by the ICJ, provisions with detailed yardsticks is a *sine qua non* which may not be possible in the proposed regulations given that various modalities of TCM may be unanticipated, requiring improvisation in dispute resolution.

The suitability of ICJ for adjudicating on TCM disputes can also be contended on the basis of lack of expert adjudicators, and questions about the urgent resolution and enforcement of decisions given the time-sensitive circumstances of climate migrants. While adjudicating upon a question pertaining to whether the climate migrants from the origin state have absolutely nil possibility of continuing to inhabit the origin state, the significance of experts rather than legal officers is highlighted. Experts such as social demographers, climate scientists, and disaster managers *inter alia* should be considered crucial actors in finding solutions

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[105] R. Kolb, *supra note* 40, p. 304.

[106] J. G. Devaney, *The Role of Precedent in the Jurisprudence of the International Court of Justice: A Constructive interpretation*, "Leiden Journal of International Law", Issue 35, 2022, p. 653.

[107] S. Behrman, A. Kent, *supra note* 28, p. 370.

to manage TCM efficiently in a way that assures climate migrants basic living and livelihood conditions along with social integration in the host state. This task cannot be successfully resolved by legal officers who are supposed to decide on the validity of an action or performance of an obligation in accordance with a specific legal instrument.

With regard to the viability of the CCPR to adjudicate on TCM disputes, Serraglio (*et al*.) present the possibility of 'rights-based' litigation in TCM wherein the principle of *extraterritoriality* can be used to hold countries accountable for their human rights obligations. Under the principle, states could be held liable for violating their obligations if they are indulging in activities contributing to climate change, and thereby, jeopardizing the existence of certain groups such as coastal communities, people living in drought-hit regions, *inter alia*.[108] The viability of this approach is contested in the scheme proposed in this paper. *Firstly,* the authors have themselves identified certain obstacles in the success of climate change-litigation such as establishing causality,[109] which needs to be clearly and unequivocally traceable in a litigation forum.

The requirement to substantiate one's claim for planned relocation through establishing causality can impose a huge burden and approaches the issue with a *punitive* philosophy, wherein a State which has been established to have caused inhospitable conditions in the origin State is required to fulfil reparations by harbouring climate migrants. While philosophically, this line of thought is valid, given the historical responsibility of the Global North, pragmatically, making Global North countries amenable to cooperate in TCM management and planned relocation, would require an adjudication which prioritizes consensus and cooperation, with an undertone of acceptance by Global North countries of their special responsibilities.

Secondly, this form of litigation depends on established human rights norms, which, while laudable, can lead to interpretative constraints as seen in *Teitiota*. Even if the new set of regulations choose CCPR to be the adjudicatory form, which will address the issue of interpretation constraints, it will narrow down the scope of adjudication to only IHL. This can be a disadvantage, given that there can be inter-state disputes,

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[108] D. A. Serraglio, F. Capdeville, F. Thornton, *supra note* 29, p. 7.

[109] *Ibid*., p. 16.

as identified earlier, which necessarily may not emanate from human rights considerations, such as the modalities of planned relocation. Even when these emanate from human rights considerations, they have the potential for creating a disproportionate burden (though legitimate) on some States such as those of the Global North which will make them averse to signing up to the proposed set of regulations.

Moreover, climate change litigation has been observed as a feasible course of action for reparations domestically, with certain exceptions of CCPR cases such as *Teitiota*.[110] In *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* the European Court of Human Rights ('ECHR') addressed a challenge against Switzerland by Swiss citizens where Switzerland was alleged to have taken insufficient measures to reduce contributing to climate change. The ECHR, while agreeing with the petitioners' contention and ruling that the Swiss authorities are under an obligation to take affirmative measures, held that the citizens did not fulfil the criterion of *locus standi* based on victim-status. The ruling was given with respect to an association which was another applicant, as it fulfilled the criteria for representing disadvantaged groups.[111] However, this case is distinguishable given that it was a case involving Global North stakeholders and therefore, did not involve the politically contestable Global North-Global South nexus. Also, drawing from the discussion on FMAs, adjudication in regions which are entirely impacted by inhospitable conditions created by climate change (such as the Global South) will have less potential to rule in a similar manner as ECHR, given that such decisions will be largely ineffective (as the culpability lies with Global North, going by historical responsibility argument) or procedurally difficult to address.

For instance, another significant regional human rights adjudicatory body is the African Court of Human and Peoples' Rights ('ACHPR') which to date has not adjudicated on climate change related cases.[112] Suedi and Fall attribute this to procedural problems such as the establishment of 'victimhood' and the inefficacy of relatively easily obtain-

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[110] S. Behrman, A. Kent, *supra note* 28, p. 363.

[111] European Court of Human Rights, *Climate Change*, 2024, available at: https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng [last accessed 07.5.2024].

[112] Y. Suedi, M. Fall, *Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls*, "Journal of Human Rights Practice", Issue 20, 2023, p. 2.

able advisory opinions, and the secondary nature of climate change-related disputes in the regional human rights jurisprudence.[113] While the development of climate litigation in Africa is foreseeable as per Suedi and Fall, they focus on the set of cases which will involve African countries liable for inaction with respect to climate change. Assuming that there will be such cases, a major reason behind the special disadvantage faced by Africa due to climate change is historical emissions by the Global North, which is not subject to the jurisdiction of ACHPR. Thus, the efficacy of ACHPR will be limited to cases where African States could be held responsible for TCM, which is heavily exclusive of the Global North and requires a high burden of proof on applicants relating to causality.

Conclusively, the issues emanating from TCM require an adjudicatory mechanism that is not confined to adjudging whether the host state and origin state are fulfilling their obligations *vis-à-vis* climate migrants. Such a mechanism should also have an enforcement aspect that lays down a plan on how the interests of the climate migrants can be best served in accordance with international law principles. This is where the significance of arbitration is realized.

2. The Scope of Arbitration

Arbitration as a suitable TCM adjudicatory mechanism is a possibility that has not been explored before. The foundation of interstate arbitration is laid in the arbitration agreement which is usually annexed to a principal convention/treaty that has a substantive provision for settling disputes through arbitration. In the context of a TCM governing instrument and the two types of potential disputes that have been identified earlier, the standard structure of an arbitration agreement can be problematic where only the states which are parties to the agreement can initiate the arbitration proceedings. While the ICJ excluded the possibility of climate migrants seeking redressal directly, the arbitration agreement where only states are empowered to seek resolution can similarly disentitle climate migrants unless the agreement provides for the

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[113] *Ibid*., p. 5.

option of climate migrants initiating the proceedings themselves as representatives of the concerned party state. The flexibility of framing an arbitration agreement can give arbitration an edge over ICJ litigation when it comes to the accessibility of the dispute redressal forum.

The flexibility of arbitration can also be manifested in the autonomy given to the parties to set out the principles and rules that will govern resolution proceedings. In the case of TCM, the principles of CBDR, the moral responsibility of Global North countries, other tenets instilled and emanating from the UNFCCC, and the global consensus on climate change mitigation and adaptation, *inter alia,* can be identified as primary yardsticks on which the disputes would be resolved.[114] However, this flexibility needs to be embodied in the primary convention and arbitration agreement annexed to it as the ambit of arbitration is limited by the discretion and jurisdiction set by the agreement.[115] Additionally, the time-sensitivity of TCM can be properly addressed in arbitration given the relatively faster resolution speed than the ICJ, which has been engulfed in an excessive number of proceedings.[116] For instance, in the *Kishenganga dispute,* the arbitral proceedings in PCA were instituted in 2011 with the final award declared in two years, without compromising an intensive enquiry into the dispute. The dispute concerned the impact of a river-water diversion project in India on the minimum transboundary flow determined in the Indus Water Treaty.[117] *Iron Shore* arbitration is another famous environmental dispute between Belgium and the Netherlands that was arbitrated before the PCA regarding the environmental impact assessment of a railway project; this was decided in two years.[118]

Arbitration grants the discretion to appoint suitable arbitrators with expertise in the subject matter of dispute; the qualifications of an arbitrator can be decided upon within the arbitration agreement. While the ICJ also has the autonomy to seek expert advice[119], this is recommen-

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[114] R. Paor, *supra note* 43, p. 9.

[115] *Ibid.,* p. 31.

[116] *Ibid.,* p. 24. See R. Kolb, *supra note* 40, p. 1207.

[117] *Indus Waters Kishenganga Arbitration, Pakistan v. India, Final Award, ICGJ 478 (PCA 2013)*, Part I.

[118] *Iron Rhine Arbitration, Belgium v. Netherlands, Award, ICGJ 373,* (PCA 2005).

[119] R. Verheyen, C. Zengerling, *supra note* 39, p. 4.1.

datory in nature and questions of law and legal considerations dominate the decision-making process. Expert knowledge is of vital importance in TCM disputes as noted before because of the multiple facets of the problem that potentially require a holistic approach to dispute resolution. This is not to aver that expert arbitrators can use wide and arbitrary discretion to reach a conclusion, given that they are broadly bound by the basic legal principles of natural justice, due process, and impartiality.[120] The combination of expertise and legal propriety in arbitration further transcends the legal narrowness of an ICJ litigation.

While private international arbitration is hinged upon the principle of confidentiality of proceedings, the case is different for interstate disputes. Interstate arbitration is characterized by the public disclosure of proceedings and thus, deviates from the confidentiality mandate.[121] Although this is a favourable attribute for disputes involving the host and origin states in TCM, those disputes where the climate migrants are one of the parties themselves may be interpreted as private disputes, necessitating confidentiality of the arbitral proceedings. It is noteworthy that TCM disputes are inherently of a public nature, even apart from the direct victims of a particular dispute. This is owing to the fact that these decisions can affect policy and management decisions in other events of TCM, along with global interest in the manner in which decisions pertaining to a worldwide crisis such as climate change are taken.

Paor recommends that the PCA should be the correct forum for climate change disputes in general. This opposes the idea of an International Environmental Tribunal ('IET') as recommended by the International Bar Association[122] on the grounds that it will be perceived as an "excessively pro-environment" institution, leading to its boycotting by states[123], especially the Global North countries. The PCA is best suited for exhibiting a character of neutrality, given that it also formulated the Optional Rules for specifically dealing with environmental disputes.[124]

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[120] International Chamber of Commerce, *Resolving Climate Change Related Disputes through Arbitration and ADR*, *supra note* 41, p. 19.

[121] G. Guillaume, *The Use of Precedent by International Judges and Arbitrators*, "Journal of International Dispute Settlement", Issue 2, 2011, p. 15.

[122] A. McMillan, *supra note* 98.

[123] R. Paor, *supra note* 43, p. 21.

[124] *Ibid*., p. 22.

The Optional Rules are especially suitable for TCM disputes as Article 32 lays down the binding nature of the arbitral award, which needs to be executed "without delay".[125] The same provision also provides for public disclosure of the awards, however, "with the consent of all parties".[126]

The rules also provide for gathering expert advice on disputes[127], which further integrates the significance of expert knowledge in environment-related disputes. This is in addition to the discretion given to the parties for setting out the qualifications of the arbitrators. Articles 15(4) and (5) provide for the scope of confidentiality of certain information on the plea of a party, the veracity of which is to be scrutinized by the arbitral tribunal.[128] Additionally, the legitimate parties that can appear before the PCA are not restricted to States and there are various rules that govern disputes between different categories of parties. The relevant ones in the context of TCM are the 'Optional Rules for Arbitrating Disputes between Two Parties of which only One is a State' and 'Optional Rules for Arbitration between International Organizations and Private Parties', as these can enable and assist climate migrants to initiate proceedings in the PCA.

The only criticism that can be enlisted against PCA as a legitimate authority for adjudicating TCM disputes is that the extent of TCM and climate change disputes, in general, is set to widen, and so may require a dedicated adjudicatory mechanism. While the idea of an IET has been criticized on the lines of its potential proclivity to prioritizing environmental concerns over other equally important issues involved in a dispute, there is a foreseeable surge in the significance and urgency of resolving environmental disputes that can be extremely time-sensitive as TCM disputes need to be addressed. The PCA as a sole arbitral authority for resolving TCM disputes may become an inefficient option in the future when special focus and easier accessibility to direct victims such as climate migrants will be required and may remain unfulfilled in the PCA. Owing to these reasons, there is widespread consensus over the

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[125] Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*, Art. 32 (2).

[126] *Ibid*., Art. 32 (6).

[127] *Ibid*., Article 27.

[128] *Ibid*., Article 15(4) and 15(5).

creation of an IET, that can even adjudicate upon environmental disputes even if no international legal instrument directly governs them.[129]

3. The Suitable Forum: *Sine Qua Non* Attributes

In the light of the above discussion, it is conceivable that arbitration can be a more expedient and accessible mode of dispute resolution for disputes arising in the enforcement of the legal instrument governing TCM management. However, there are certain modalities that need to be heeded in the arbitration arrangement that will be devised for TCM disputes. As pointed out by Paor, while the UNFCCC has a substantive provision that allows for the adoption of arbitration as a dispute settlement mechanism[130], the absence of an arbitration agreement annexed to it has rendered it a dead letter. This needs to be rectified with a special provision providing for arbitration as the primary dispute settlement mechanism in case of TCM disputes. This provision needs to be necessarily complemented by an arbitration agreement which will set the procedure, principles, and rules governing the arbitral proceedings.

An integral component of this agreement will be the inclusion of climate migrants as parties to the agreement by the states signing the agreement acting as *representatives of climate migrants*. This delegated representation of climate migrants will ensure that in case a dispute regarding harbouring the climate migrants from the origin state to the host state arises, then the climate migrants need not be dependent on the concerned signatory states to initiate arbitral proceedings. The climate migrants themselves will be empowered to initiate such proceedings as a collective group before the arbitral forum. This will be in addition to the prerogative of the signatory states to bring action against each other in the capacity of States.

Another crucial component of the arbitration agreement will be the choice of an appropriate arbitral forum that will ensure speedy and accessible resolution of disputes. Following the preceding analysis of the

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[129] A. McMillan, *supra note* 98.

[130] United Nations Framework Convention on Climate Change, 1992, Art. 14(2)(a). See R. Paor, *supra note* 43, p. 3.

PCA and an IET, it is proposed that the mechanism for PCA is conducive for arbitrating disputes related to TCM management *temporarily*, given that the creation of an IET will require wide-ranging consensus and time for building relevant structures. The fact that the PCA allows non-state actors to be legitimate parties in the arbitral proceedings is liberal enough to include seeking dispute redressal by climate migrants themselves as a collective group. The availability of Optional Rules imbued with the principle of speedy execution of the arbitral award and public disclosure of the arbitral proceedings further makes the PCA a favourable arbitral forum.

However, the surge in TCM disputes in the future with more extensive and intensive impacts of climate change on life-supporting mechanisms should be well-prepared for. If TCM disputes continue to be heard in PCA, there is a possibility of increasing caseload. This may affect the efficiency of PCA in resolving TCM disputes speedily. It is in this context that the significance of IET is exhibited, given that upon the creation of such an institution, environmental disputes, especially related to climate change, will potentially be resolved speedily even when the number of such disputes increases. IET will also have the likely effect of allotting to environmental law disputes a considerable level of authority in international legal regimes. Most significantly, the procedure that will be established for resolving environmental disputes in IET will itself be moulded along the lines of environmental law, while not ignoring basic legal principles, and so will make the process neutral and especially attentive to downplayed environmental concerns.[131]

Another important aspect is regarding the procedure governing arbitration dealing with TCM disputes. The procedure for arbitration of environmental disputes in the PCA is laudatory for the provision that obliges the parties to execute the arbitral award immediately. Time sensitivity is especially critical in TCM disputes given the statelessness of climate migrants in the light of the dilapidation of the origin state and non-acceptance by the host states. However, given that these rules are optional in the PCA, there is a possibility that the host state may not consent to follow them. Therefore, an IET will have leverage over PCA if

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[131] P. Riches, S. A. Bruce, *Brief 7: Building an International Court for the Environment: A Conceptual Framework,* Governance and Sustainability Issue Brief Series 2013, available at: https://scholarworks.umb.edu/cgs_issue_brief_series/7/ [last accessed 07.5.2024].

these rules are incorporated as mandatory procedural guidelines in the former. Additionally, the relevant arbitral tribunal must enhance its repository of arbitrators who are experts in climate change, human rights, and migration, given that TCM is potentially intersectional in nature.

However, it is equally essential that the arbitral awards are enforced with the utmost accountability and expediency. This requires the arbitral forum to have an enforcement side, similar to the functioning of the CCPR. The enforcement side will coordinate with international organizations, including the UNSC and signatory states to ensure that the arbitral award is executed in time without any detrimental impacts on the climate migrants. This will ensure that the arbitral awards are not rendered ineffective. Lastly, the arbitral mechanism should undergo modifications with advancement in the environmental law jurisprudence and surging urgency in resolving TCM disputes, to keep the mechanism effective.

Conclusions

As climate change mitigation strategies fail to meet the requisite level of efficacy and speed to curb the worst impacts of climate change, the occurrence of TCM cannot be sidelined, given the projections that some regions of the planet will become uninhabitable. In the light of this, it is imperative to create an elaborate legal scheme to regulate TCM that will enable climate migrants to seek accommodation in states that are not equally impacted by EWEs, through an accessible arbitration model, as proposed in this paper. This accommodation should adhere to certain principles of environmental justice including CBDR, the collective rights of climate migrants, the collective responsibility of the international community, and human rights considerations, such as migration with dignity.[132] While FMAs are instruments that can be created feasibly, the concerns regarding regional hierarchy and the general nature of the arrangement make it practically non-viable. UNFCCC can be moulded to create a specific TCM legal regime within it, which will enable a holis-

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[132] The Nansen Initiative, *supra note* 85, pp. 47-48; S. Atapattu, *Climate Change and Displacement: Protecting 'Climate Refugees' within a Framework of Justice and Human Rights*, "Journal of Human Rights and The Environment", Issue 11, 2020, p. 86.

tic approach to managing TCM within international climate change law. The provisions must be binding on the parties to ensure that they perform their respective obligations diligently with an enforcement mechanism in place to adjudicate in case the obligations are not fulfilled.

Given that a dispute resolution mechanism must be set in place for settling enforcement issues that may arise between origin and host states, or between climate migrants and host states, it has been argued in this paper that ICJ is not an appropriate forum. The fact that only States can be legitimate parties before the ICJ makes it an inaccessible forum for climate migrants who suffer the direct detrimental impact of EWEs or climate processes. The lack of experts as adjudicators further makes it an inappropriate forum given the complex intersection of human rights, migration, and climate change law in TCM disputes, which require delicate manoeuvring. Additionally, an intensive focus on questions of law *vis-à-vis* questions of fact which can potentially be integral to TCM disputes, along with time-insensitivity in delivering verdicts, can pose other hindrances in the effective resolution of TCM disputes. With regard to CCPR and other litigatory fora, the emphasis on human rights for resolving TCM disputes is significant. But the strict requirements of establishing direct causality, the punitive nature of proceeding against potential host states in order to force them to accommodate climate migrants and to narrow their focus on human rights which sidelines the non-human rights aspects of TCM make CCPR and other litigatory forums unsuitable for TCM disputes which require a pragmatic, cooperation-based and holistic approach.

Arbitration can be vouched for as a more effective dispute redressal mechanism given that restrictions based on the state/non-state nature of the parties are not prevalent in arbitration. Additionally, the flexibility of the arbitral process will make it possible to incorporate rules of procedure and principles that ensure that the proceedings are time-sensitive and follow the basic principles of environmental justice as imbued in the UNFCCC or developed in customary international law. While the PCA currently has the requisite capacity and rules of procedure to address environmental disputes, the foreseeable increase in such disputes requires that a special institution such as the IET is created for the timely resolution of environmental disputes with the utmost regard for the significance of environmental law in justly managing disputes such as TCM.