

THE NORMATIVE FRAMEWORK OF CLIMATE CHANGE-RELATED DISPLACEMENT

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For Event: ‘Addressing the Legal Gaps in Climate Change Migration, Displacement and Resettlement: From Sinking Islands to Flooded Deltas’

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A Introduction

According to the UN Emergency Relief Coordinator, more frequent and severe disasters may be ‘the new normal’.¹ On top of this, slower onset impacts of climate change, such as temperature rises, glacial melt, drought, and sea-level rise may ultimately force people away from their homes. The UN High Commissioner for Refugees has said that ‘while the nature of forced displacement is rapidly evolving, the responses available to the international community have not kept pace.’²

Although there is a lot that we don’t know about the future movement of people on account of climate impacts, how can the things we *do* know help us identify the legal gaps in the existing international protection regime, and develop legal and policy responses that are adequately attuned to the needs of those who are likely to move. This means having a sufficiently nuanced understanding of the likely nature, timing and scale of such movement.

While the concept of ‘environmental’ or ‘climate change’ refugees may provide a useful advocacy tool to generate attention and mobilize civil society around the dangers of global warming, it can also contribute to misunderstandings about the likely patterns, timescale, and nature of climate change-related movement. Even as a merely descriptive term, the ‘climate change refugee’ label is at best pre-emptive, and at worst offensive to those to whom it is ascribed. For example, in the small Pacific island States of Kiribati and Tuvalu, it is seen as invoking a sense of helplessness and a lack of dignity. As the President of Kiribati told me, ‘when you talk about refugees—climate refugees—you’re putting the stigma on the victims, not the offenders.’³ ‘We don’t want to lose our dignity. We’re sacrificing much by being displaced, in any case. So we don’t want to lose that, whatever dignity is left. So the last thing we want to

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¹ Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, ‘Opening Remarks at the Dubai International Humanitarian Aid and Development Conference and Exhibition “DIHAD 2008 Conference”’ (Dubai, 8 April 2008) <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7DHL88?OpenDocument> (accessed 18 January 2010).

² ‘Statement by Mr António Guterres, United Nations High Commissioner for Refugees, Intergovernmental Meeting at Ministerial Level to Mark the 60th Anniversary of the *1951 Convention relating to the Status of Refugees* and the 50th Anniversary of the *1961 Convention on the Reduction of Statelessness*’ (Geneva, 7 December 2011) <http://www.unhcr.org/4ecd0cde9.html> (accessed 2 April 2012).

³ Interview with President Anote Tong, President of Kiribati (Tarawa, Kiribati, 12 May 2009).

be called is ‘refugee’. We’re going to be given as a matter of right something that we deserve, because they’ve taken away what we have.’⁴

As a matter of law, the term ‘refugee’ is a legal term of art. The 1951 Refugee Convention defines a refugee is someone with a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group. There are a number of hurdles here in translating this to the climate displacement context. First, there are difficulties in characterizing ‘climate change’ as ‘persecution’. Though adverse climate impacts such as rising sea-levels and increases in the frequency and severity of storms, cyclones, floods are harmful, they do not meet the threshold of ‘persecution’ as this is currently understood in law, which normally requires human agency. If anything, the ‘persecutor’ here is industrialized States, whose failure to cut greenhouse gas emissions has led to the predicament now being faced⁵ – the very countries to which movement might be sought if the land becomes unsustainable, which is a complete reversal of the traditional refugee paradigm.

Secondly, even if the impacts of climate change could be characterized as ‘persecution’, it would be very difficult to show this was for reasons of one of the five Refugee Convention grounds, since the impacts of climate change are largely indiscriminate, rather than tied to particular characteristics such as a person’s background or beliefs. Finally, refugee law only applies to people who have *already* crossed an international border, not people merely contemplating a move.

B Policy options

1 A new treaty

For this reason, there have been calls from some quarters for a new international treaty to address the movement of people displaced by climate change.⁶ Proposals vary from creating a protocol to the 1951 Refugee Convention, a protocol to the UN Framework Convention on Climate Change (UNFCCC),⁷ or a stand-alone treaty,⁸ to provide so-called ‘climate refugees’ with international protection, including a legal status and resettlement/integration solutions.

⁴ *ibid.*

⁵ See IPCC, *Climate Change: The IPCC Scientific Assessment*, 8 (fn omitted); IPCC, *Climate Change 2007: Synthesis Report*, 5, 6, 12, 13.

⁶ For a critique of this idea, see Jane McAdam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not *the* Answer’ (2011) 23 *International Journal of Refugee Law* 1.

⁷ UN Framework Convention on Climate Change (adopted 9 May 1992) UNTS 107, 1771. See eg Frank Biermann and Ingrid Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10 *Global Environmental Politics* 60; for criticism of their approach, see Mike Hulme, ‘Commentary: Climate Refugees: Cause for a New Agreement?’ *Environment* (November–December 2008). For another UNFCCC-based proposal, see Angela Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ (2008) 30 *Law & Policy* 502.

⁸ ‘Draft Convention on the International Status of Environmentally-Displaced Persons’ (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges) (2008) 4 *Revue Européenne de Droit de l’Environnement* 375; Bonnie Docherty and Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 *Harvard Environmental Law Review* 349, 350, 373; ‘A Convention for Persons Displaced by Climate Change’ (last updated 2010) <http://www.ccdpconvention.com/> (accessed 7 December 2009).

There are, however, a number of shortcomings to creating a new treaty. First, treaty proposals are premised on certain assumptions about climate change and human movement that are not borne out in empirical studies, which show that movement is likely to be predominantly internal and/or gradual, rather than in the nature of refugee ‘flight’.⁹

Secondly, it is conceptually problematic and empirically flawed to suggest that climate change alone *causes* people to move. Some of the treaty proposals suggest establishing an expert scientific body to determine this in each case. In my view, this is unworkable in the protection context. It misplaces the real focus of the inquiry, which should be on the nature of harm feared if a person is returned home.

Thirdly, it would privilege those displaced by climate change over other forced migrants (such as those escaping poverty), perhaps without an adequate (legal and/or moral) rationale as to why. It may be preferable to create an instrument responding to disasters per se, rather than those linked to climate change, for example.

Finally, there would seem to be little political appetite for a new international agreement, especially given the millions of refugees without solutions, despite a strong legal framework. Even if a treaty were achieved, States would have to demonstrate sufficient political will to ratify, implement and enforce it.

A particular challenge for any new treaty would be adequately accounting for slow-onset movements brought about by gradual environmental deterioration, as opposed to flight from sudden disasters. The refugee paradigm, which premises protection needs on imminent danger, does not capture the need for safety from longer-term processes of climate change which may ultimately render a person’s home uninhabitable.

This is the same for **human rights-based sources of protection**. Under the ICCPR, States are precluded from returning people to face such harms as arbitrary deprivation of life and cruel, inhuman or degrading treatment or punishment. This is known in international law as ‘complementary protection’. Although existing complementary protection jurisprudence does not *preclude* climate impacts from being recognized as a source of inhuman treatment (for example), it would need to be substantially developed before such harms would fall clearly within the scope of this concept.

Even though the impacts of climate change may ultimately render basic survival in a particular location impossible, the present complementary protection grounds would only assist a person once conditions were already very extreme. This mechanism does not allow for pre-emptive movement where conditions are *anticipated* to become dire, and thus would not assist people trying to move before the situation becomes intolerable. Thus, it will likely take some decades before the effects of climate change, interacting with underlying socio-economic vulnerabilities, will be seen as constituting a violation giving rise to protection from removal.

⁹ See eg Frank Laczko and Christine Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (Geneva, IOM, 2009); EACH-FOR, *Synthesis Report* (14 May 2009).

A number of countries, such as the US, provide **temporary protection** as a blanket form of relief to people displaced by sudden disasters. Often, though, an executive decision is required before the protection can be accessed, and in the case of the US, Temporary Protected Status is only granted to people already in the US when disaster strikes. It effectively operates as little more than a stay on deportation.

Many States have some form of **discretionary leave** to remain on humanitarian or compassionate grounds. Their applicability to a person seeking protection on the basis of climate change-related displacement will vary from jurisdiction to jurisdiction, since each has different requirements as to eligibility for humanitarian protection and it remains to be seen whether the decision makers would be prepared to construe their circumstances as being of an exceptional humanitarian nature. Furthermore, this is typically emergency protection after a particular event, rather than pre-emptive protection for projected longer term impacts.

2 Guiding principles on climate change-related movement

Given these protection gaps, there have been efforts among the UN humanitarian community to mobilize States to develop a global guiding framework on climate change-related displacement, similar in nature to the Guiding Principles on Internal Displacement, but for cross-border displacement.

(With respect to *internal* climate-related displacement, there is general consensus that the Guiding Principles on Internal Displacement require little alteration for that context.¹⁰ They already refer to flight from ‘natural or human-made disasters’, and their identification of rights and needs pertinent to particular phases of displacement—the pre-displacement phase, the phase of actual displacement, and the resettlement or relocation phase—is especially helpful.¹¹)

The advantage of a soft law framework like the Guiding Principles is that it is ‘flexible and allows [States] to experiment with new ideas.’¹² By drawing together relevant law derived from States’ existing treaty obligations, they would not require States to assume new obligations, but clarify how those obligations might apply in the climate change displacement context. Over time, guiding principles may facilitate the implementation of such norms into domestic law, or inform, with the benefit of State practice, new multilateral instruments.

¹⁰ See Bellagio Deliberations, para 19; Chairperson’s Summary at the Nansen Conference, para 19: ‘Both the Guiding Principles on Internal Displacement and the African Union’s 2009 Kampala Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) in Africa cover internal displacement resulting from natural disasters, including those linked to climate change.’

¹¹ See also Khalid Koser, ‘Climate Change and Internal Displacement: Challenges to the Normative Framework’ in Etienne Piguet, Antoine Pécoud and Paul de Guchteneire (eds), *Migration and Climate Change* (Cambridge University Press and UNESCO Publishing, 2011); Susan F Martin, ‘Managing Environmentally Induced Migration’ in Frank Laczko and Christine Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (IOM, 2009).

¹² Walter Kälin and Nina Schrepfer, ‘Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches’ (Study for the Swiss Ministry of Foreign Affairs, April 2011) 58.

This idea was pitched to 145 governments at UNHCR's high-level Ministerial Meeting last December.¹³ However, only four countries pledged to explore with UNHCR initiatives at regional and sub-regional levels 'to assess the protection gaps created by new forms of forced displacement, especially environmentally-related cross-border displacement.'¹⁴

The underwhelming support is perhaps not surprising, given that mid-last year, UNHCR's Standing Committee, comprised of States, rejected a proposal for a pilot scheme whereby UNHCR would become the lead agency for the protection of those affected by natural disasters. Although almost half thought it desirable in principle, the majority prevailed, arguing that 'outstanding questions' relating to issues of State sovereignty, mandate implications, resources and capacity, and disengagement strategies remained unresolved.¹⁵

3 Managed migration

Managed international migration may provide a safer and more secure mechanism for enabling people to move away from the longer-term effects of climate change, without artificially treating people as in need of international 'protection' (from a persecutory or abusive State). Managed migration pathways are also better suited to respond to slow-onset climate change impacts, which are unlikely to trigger existing (or future) temporary protection mechanisms designed for sudden disasters. The President of Kiribati, for example, has been very vocal in promoting the idea of merits-based migration, or 'migration with dignity'. Overseas employment also provides a livelihood diversification and risk management strategy. Not only would it relieve resource pressures on the islands, but remittances from those migrants could contribute to further adaptation funding there. Additionally, since Kiribati cannot sustain a population of its current size, greater out-migration could mean that a smaller population could remain for longer. In this way, migration can become a form of adaptation, rather than a sign of a failure to adapt.

D Conclusion

Legal and policy responses have to involve a combination of strategies, not an either/or approach. Physical adaptation needs to be financed and developed, and migration options, including opportunities for economic, family and educational migration, need to be accepted as a rational and normal adaptation strategy, rather than as a sign that adaptation has failed. While movement can be a sign of vulnerability, it can also be a means to achieve security and attain human rights, especially when it can be planned. Solutions need to be developed within a human

¹³ Delegates were asked to consider whether it would be useful for States, UNHCR and other relevant actors to develop a global guiding framework or instrument to apply to situations of displacement across borders other than those covered by the 1951 Convention? If so, should this be limited to displacement relating to climate change and natural disasters, or could it be broader? Could temporary or interim protection arrangements be useful?:

Intergovernmental Event at the Ministerial Level of Member States of the United Nations on the Occasion of the 60th Anniversary of the 1951 Convention relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness (7–8 December 2011), 'Background Note for the Roundtables', UN Doc HCR/MINCOMMS/2011/08 (18 November 2011), Roundtable 1, question viii.

¹⁴ 'UNHCR Intergovernmental Meeting at Ministerial Level: Closing Remarks by the United Nations High Commissioner for Refugees' (8 December 2011) <http://www.unhcr.org/4ef094a89.html> (accessed 2 April 2012) 1.

¹⁵ UNHCR Executive Committee, 'Draft Report of the 51st Meeting of the Standing Committee (21–23 June 2011)' (16 September 2011) UN Doc EC/62/SC/CRP.25, para 32.

rights framework, underscored by broader humanitarian norms such as the fundamental principles of humanity, human dignity, human rights and international cooperation.

Localized or regional responses may be better able to respond to the particular needs of the affected population in determining who should move, when, in what fashion, and with what outcome. Staggered migration, circular migration, or the promise of a place to migrate to should it become necessary might be welcome measures that could appeal both to host and affected communities alike.¹⁶ Furthermore, by contrast to many other triggers of displacement, the slow onset of some climate change impacts, such as rising sea levels, provides a rare opportunity to *plan* for responses, rather than relying on a remedial instrument in the case of spontaneous (and desperate) flight.

Crucially, policy responses to climate-related movement must not operate in a vacuum. To be effective, interventions must be attuned to and complement policies relating to development, housing, family planning, and the ‘carrying capacity’ of particular environments. This requires sustained dialogue between actors from each of these policy and disciplinary spheres to ensure that responses are appropriately targeted.

¹⁶ This is the preferred approach of the government of Kiribati, for example. See eg comments of Kiribati’s Foreign Secretary, Tessie Lambourne cited in Lisa Goering, ‘Kiribati Officials Plan for “Practical and Rational” Exodus from Atolls’ (*Reuters AlertNet*, 9 December 2009) <http://www.trust.org/alertnet/news/kiribati-officials-plan-for-practical-and-rational-exodus-from-atolls/> (accessed 14 January 2011).