
CLIMATE CHANGE-INDUCED DISPLACEMENT: THE LEGAL VACUUM IN PROTECTING CLIMATE REFUGEES

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ABSTRACT

Climate change is increasingly causing large-scale human displacement, yet international law does not adequately protect such individuals. This paper examines the legal gap in protecting climate-displaced persons, focusing on the limitations of the refugee regime and the role of human rights law. It argues that a combined approach involving complementary protection, regional mechanisms, and policy reforms is necessary to address this growing crisis.¹

Keywords: Human Rights Law, Climate Refugees, International Refugee Law, Climate-Induced Displacement, Non-Refoulement.

Introduction:

Climate and weather extremes are affecting displacement in all the regions and scientific evidence has confirmed this with low-lying coastal areas and small island states being affected more disproportionately. The Internal Displacement Monitoring Centre has recorded tens of millions of newly displaced every year because of weather-related disasters, and the Sixth Assessment report of IPCC points out that the number of new displacements is going to increase as floods, storms, droughts and rising sea levels reach more and more.²

However, the existing refugee framework fails to recognize individuals displaced due to climate-related harm.³

The consequence is that there is a large protection gap: individuals can face actual danger to their lives and other fundamental rights due to climate effects, but they have no safe path to

¹ UNHCR, Legal Considerations regarding climate change(2020)

² IPCC, Sixth Assessment Report, working Group II(2022)

³ Internal Displacement Monitoring Centre Report

admission, residency or long-term resolutions when they cross borders.⁴

This paper will serve the purpose of identifying that gap in a systematic way using a human-rights approach, involving climate change-related displacement and emerging (yet, fragmented) legal repercussion at the global, regional, and national levels. It briefly discusses the current refugee legal regime and the existing climate change legal order after establishing the conceptual and normative framework, then looks at the legal vacuum on climate-induced displacement, both judicial and international trends and briefly comparative analysis with reference to Africa and South Asia, inter alia. The paper has ended by defining the main challenges and a few doctrinal and policy recommendations that would enable the transition of responding on ad hoc to more comprehensive regime when confronting numbers of climate refugees.⁵

Framework:

Conceptualising climate-induced displacement:

Working Group II of IPCC observes with substantial confidence that the occurrence of climate and weather extremes is contributing towards increasing displacement in Africa, Asia, North America, Central and South America with the small island developing states being particularly prone to them.⁶

Internally displaced persons are those who have not crossed an international border. Depending on the situation, displaced persons who are caused by climate can fall into either of these categories, though in most cases across cross-border cases they cannot be found in current legal boxes, which has led to the concept known as a protection gap.⁷⁸

Cross-cutting norms of human rights and non-refoulement:

All individuals displaced due to climate change, regardless of their official migration status, are rights-holders in the international human rights law, core treaties and documents, including

⁴ UNHCR, Legal Considerations regarding climate change(2020)

⁵ General article on climate displacement

⁶ IPCC, Sixth Assessment Report, working Group II(2022)

⁷ UN reports

⁸ UNHCR, Legal Considerations regarding climate change(2020)

the International Covenant on Civil and Political Rights (ICCPR).⁹ In its landmark judgment of 2020, in the case of *Teitiota v New Zealand*, the UN Human Rights Committee concluded that states could not deport persons of the host state where the conditions caused by climate change would subject them to a genuine threat of permanent impairment of the right to life under article 6 of ICCPR.¹⁰ Non-refoulement obligations under human rights law can, in certain instances, be wider than the limited principle of the refugee law and need not involve imminence in the sense of the catastrophe being imminent, particularly when it is a gradual process such as rising sea-levels.¹¹

These rights along with the principle of non-discrimination and equality provide the normative starting point according to which the sufficiency of current regimes on displacement and refugee protection should be evaluated and are under more frequent use in climate litigation involving a focus on migration invariably before regional and domestic courts (as with the recent climate cases heard by European court of human rights involving inadequate mitigation measures).

The current Refugee Law Regime:

1951 Convention Relating to the status of Refugees Act and its jurisdiction:

The 1951 Convention on the status of refugees¹² and its 1967 Protocol are the sole international and binding treaties that provide the definition of a refugee as well as the rights and the state obligations that go with it. Article 1A(2) refers to a refugee¹³ as one having a well-founded fear of persecution due to race, religion, nationality, belonging to a specific social group or political opinion, and in whom a refuge cannot or will not be available in his or her country of origin.

In its rulings either supported by UNHCR or by national courts, climate changes, environmental degradation or natural disasters, as such, have always been noted to not qualify as grounds of persecution¹⁴ under the Convention, except when strongly associated with one of the identified grounds of protection and when the circumstances involve human action (such as the refusal to provide disaster relief in a discriminatory way). New Zealand courts in the

⁹ ICCPR, Article 6

¹⁰ *Teitiota v New Zealand*

¹¹ UNHCR, Legal Considerations regarding climate change(2020)

¹² Refugee Convention

¹³ Refugee Convention, art.1A(2)

¹⁴ UNHCR, Legal Considerations regarding climate change(2020)

domestic litigation of Teitiota recognised the severity of the climate effects in Kiribati but determined that he was not persecuted as stipulated by the 1951 Convention since such harms were generalised and not specific to him on a Convention basis. This demonstrates that the existing refugee framework is structurally inadequate to address climate-induced displacement.

Regional refugee instruments:

The regional frameworks expand the definition of refugees partially, but still incidentally cover climate-related harms. The 1969 Convention of the specific aspects of the problem of refugees in Africa of the OAU provides protection to individuals who were forced to depart their nation as a result of events that are deemed to be of a serious disturbance to the public order formulation, which has been understood to incorporate some of the cases of generalised violence and possibly some disaster circumstances.¹⁵

According to UNHCR (2020) Legal Considerations on climate change and disasters, persons escaping under such circumstances may have legitimate claims to refugee status under the 1951 Convention or these regional instruments when climate harms interact with persecution or violence (i.e. where drought worsens ethnic conflict or neglected by a state in a discriminatory manner). Nonetheless, they are contextualized and cannot establish a common situation of those who are displaced by environment-related factors as many individuals would not be considered as refugees regardless of their extreme vulnerability.¹⁶

Complementary and subsidiary protection:

In other jurisdictions, complementary or subsidiary protection regimes seal a section of the protection risk by forbidding removal in situations where return would subject a person to grave risks, including death penalty, torture or inhuman or degrading treatment, regardless of whether they have a nexus to the Convention grounds. The Human Rights Committee in Teitiota confirmed that deportation to an area where climate change-related factors put the right to life at risk would potentially violate non-refoulement commitments under the ICCPR, indicating that human rights-based complementary protection could potentially, at least on paper, protect some of the climate-Displaced individuals against deportation. However, complementary protection does not usually ensure a right of refoulement but a right of minority protection, and

¹⁵ Kampala Convention

¹⁶ Cartagena Declaration

the national practices are not yet clear and not yet sufficiently developed in the particular climate scenario.

Law Framework of Climate Change:

UNFCCC, Kyoto Protocol and Paris Agreement.¹⁷ Climate change regime, led by UN Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and Paris Agreement was created to control the state mitigation and adaptation targets and to deal with loss and damage in the impacts of climate; it was not written as a protection regime of people displaced. The preamble to the Paris Agreement recognizes that states have a duty to respect, encourage and take into account their respective duties on human rights also including migrant human rights in the implementation of the climate action plan, but it does not establish nor develop individual rights nor migration specific rights or duties.

Nansen Initiative and Platform on Disaster Displacement:

With a realisation that there is no current treaty directly dealing with displacement across borders in the areas of disasters and climate change, Switzerland and Norway initiated the Nansen Initiative in 2012, as a state-led consultative process.

The Platform on Disaster Displacement (PDD), created in 2016 to carry out the Protection Agenda, is still promoting the inclusion of displacement in climate negotiations, particularly in the Loss and Damage architecture, and work to assist states to adopt national and regional action. Although Nansen/PDD process has brought a great deal of development to policy thinking and soft-law commitments, it does not in its own right establish definite rights on cross-border displaced individuals.¹⁸

International agreements on Refugees and Migration:

In 2018, 229 UN member states passed the Global Compact on Refugees (GCR) and the Global Compact on safe, orderly and regular Migration (GCM) which are non-binding but at the same time, politically important instruments. The GCR accepts the fact that climate and environmental degradation and natural disasters are becoming more interacting factors with the causes of the movement of refugees without going further and considering them as independent

¹⁷ Paris Agreement

¹⁸ Nansen Initiative

factors causing the status of refugees but resorts to the idea of sharing responsibility and assisting the host communities to cope with these events.

In comparison, the GCM has more open and stronger words regarding disasters, climate change and environmental degradation, acknowledging them as origins of the migration and establishing the commitment to creating adaptive strategies, utilizing humanitarian visas and temporary protection, and the ban on returning migrants to conditions of unrepairable injury (Objective 2 and 21). The GCM is acclaimed by commentators as a breakthrough on disaster-displaced people, but is pointed out as moral and political in its promises and there will be wide disparities among states in implementing it.¹⁹

Displacement Caused by Climate Change: A Legal Loophole:

IDP protection and internal displacement:

The majority of displaced victims of the climate-related catastrophes are internally displaced individuals within their home countries, leaving them under the main jurisdiction of their home country and in Africa, the binding Kampala Convention. Non-binding, but with many countries having incorporated their principles into national law, the UN Guiding Principles on Internal Displacement apply to cases of displacement due to natural or man-induced disasters and set the standards and principles of protection, assistance and durable solutions. Kampala Convention of African Union even mandates states to protect and assist internally displaced persons because of natural or human-made disasters and climate change is among them, which is why climate impacts are explicitly considered in the context of a regional treaty on IDP.²⁰

The framework of IDP, so the persons, who are obliged to leave their country due to their land becoming inhabitable such as the inhabitants of low-lying atoll states, have no definitive legal basis of admission and residence elsewhere.

The problem of cross-border climate refugees and statelessness:

In relation to cross-border movements, there is still no treaty that acknowledges climate refugees as a legal category and provides a right to admission or non-return due to harm related to climate alone and several authoritative studies stress the fact that there is currently no legal

¹⁹ GCM(2018)

²⁰ UN Guiding Principles

status under international law to protect climatic refugees.²¹

The idea of the possibility of whole territories being inhabited by the rise of sea levels creates the added issue of the statelessness which is not a matter of law but a matter of life and death, to which small island states are subjected as the land of State and freshwater resources becomes an existential threat to them. Although international law has norms dealing with continuity of statehood and the prevention of statelessness, there is no internationally agreed method to transfer populations and retain states in such situations, and no assurance that the other states will treat displaced peoples as permanent residents or citizens under such circumstances (when their own states became physically inhabitable).²²

Fragile transnational legal regimes:

On the whole, climate-driven displacement occupies the crossroads of a variety of regimes such as international refugee law, human rights law, migration law, disaster law and climate change law, each of which deals with a subset of the issue yet none of which provides holistic protection. In an effort to persecute, the refugee regime targets the human rights regime which deals in non-refoulement and minimum standards of treatment, the climate regime which is concerned with inter-state mitigation and adaptation obligations and those dealing with disaster aspects which are internal displacement and humanitarian response resulting in a patchwork of norms with serious gaps. Researchers and policy makers thus talk of a legal vacuum or an absence of a safe haven of climate-displaced individuals, especially those who transverse boundaries and do not fit into classic refugee categories and traits.

Courts and International Developments:

New Zealand and the Human Rights Committee v Teitiota:

The case of Ioane Teitiota of Kiribati involved the search of asylum by the state of New Zealand on the basis that his homeland was unlivable due to rising sea-levels, salinising freshwater and land conflict, and that his displacement infringed the New Zealand responsibilities under the refugee and human rights law.

In 2015, on the occasion of his deportation, Teitiota presented a communication to the UN

²¹ UNHCR, Legal Considerations regarding climate change(2020)

²² International law article

Human Rights Committee, claiming that his right to life under 6 ICCPR was violated, circumstances that caused the plaintiff to suffer a real threat of permanent harm were returned by states; in response, the Committee ruled that the plaintiff in 2020 failed on the facts but that the clause did not bar a state returning people. The Committee stated that immediate slow-onset processes (sea-level rise, salinisation, land degradation, etc.) and immediate sudden-onset events (storms, flooding), can initiate these risks, and that the asylum-seeker must not need to prove harm is imminent in the narrow temporal sense, but that the future harm is reasonably foreseeable instead (Watts, 2009).²³

UNHCR Legal considerations and directions:

Based on Teitiota, and the wider practice, in 2020, UNHCR released its Legal considerations²⁴ regarding claims to international protection in the context of the adverse effect of climate change and disasters, affirming advice to the governments and decision-makers. The document clarifies why persons who flee as part of climate change might be considered to qualify as the requirements of the 1951 Convention or regional refugee instruments, especially when the effects of climate raises conflict, violence, or discriminatory state reactions. It also underlines the use of complementary protection under the treaties on human rights in a bid to avert refoulement in instances of life-threatening environmental degradation thereby stretching the pathways through which some of the climate-displaced individuals can access protection.

The instructions of UNHCR, however, does not modify the fundamental definitions of the treaties; it acts within the current legislation and relies on the readiness of national authorities to utilize these interpretation methods in practice, which is not consistent by jurisdiction.

UNFCCC and soft-law forums: climate processes:

The Warsaw International Mechanism together with the Task Force on Displacement have given human mobility a higher priority in the UNFCCC, yielding recommendations on how to incorporate displacement into national adaptation, early-warning systems, and risk-cutting efforts. The PDD and allied partners still hold the view that displacement should be recognised as a major loss and damage and that climate finance should be redirected to both off-site

²³ Teitiota case

²⁴ UNHCR, Legal Considerations regarding climate change(2020)

adoption and decent relocation (where needed) as a way to address displacement.

The things under the parallel processes GCM and GCR have normalised the concept that climate change is a migratory factor and the response to it should be made through migration policy instruments, yet such processes are still strongly politicised and have brought some governments into opposition because of perceived commitments to accept in-migration of so-called climate refugees.

Comparative Analysis:

Kampala Convention and African Union:

The continent of Africa is unique in that it can be raised as the sole region where a binding treaty expressly applies to internal displacement that is connected to climate and, much more generally, by the largest number of states with respect to which the definition of refugees applies in OAU. The Kampala Convention requires the states to make efforts to shield and maintain those who have been internally displaced owing to natural or human-made catastrophes, such as climate changes, and to implement early-warning, disaster-calamity-cutback, and long-term remedy strategies. Surveys of its application, however, show that much attention and resources remain devoted to conflict-based displacement, even though in many cases it is the environmentally-induced displacement, with environmental displacement still frequently overlooked, particularly where it is caused by low-frequency climatic events if it is caused at all.²⁵

To some extent, theoretically, the OAU Convention, together with Kampala Convention and UNHCR guidance, would provide an African state with a relatively extensive normative foundation to consider some of the cross-border and internally displaced climate-displaced persons as refugees or IDPs, but in reality, political goodwill, capacity factors, and competing crises restrict its transformative capabilities.²⁶

Europe and the Americas:

In the EU, the Qualification Directive creates subsidiary protection to individuals who are actually at risk of serious harm in the event of a return, which may include some climate-related

²⁵ Kampala Convention

²⁶ EU Directive

cases but there is currently no codified procedure of identifying climate-related harms as a factor creating such protection. The Temporary Protection Directive of the EU, which is aimed at situations of a mass influx, theoretically may be triggered in case of large-scale climate migration, however, to date it has been activated only in a conflict situation (e.g., Ukrainians in 2022), which proves that the mechanism is politically rather than technologically inspired.

The broader definition of refugees and tradition of regional solidarity in the Cartagena Declaration offer Latin America a more promising approach to addressing the needs of climate-displaced persons when environmental disasters pose a serious threat to civic order or are intertwined with rights abuses, and more recent policy discussions have touched the application of humanitarian visas and regional mobility schemes to disasters. However, practice is spotty and mostly ad hoc and many displaced persons depend on regular migration patterns or irregular movement instead of protection-based patterns.

South Asia and India:

One of the most climate-prone areas of the world is South Asia, which lacks a regional refugee or displacement convention, and not a single state in the SAARC is a party to the 1951 Convention or the 1967 Protocol. India is also not a signatory to the Refugee Convention; nor does it possess a domestic refugee law; refugees and migrants are instead regulated by general foreigner laws such as the Foreigners Act 1946 and Passports Act 1967, which are not yet finalized; however, the country has large numbers of refugees, with millions more expected to move within and without its borders if vulnerable to climate change.²⁷

Although in the principle, there are constitutional guarantees and the right to life and Articles 14 and 21 covers the non-citizen population. This places climate-displaced individuals such as internal and cross-border dependence on executive benevolence, broad-based on the law of disaster management and development-oriented schemes, instead of justiciability-protected migrant rights of protection. This reflects a significant policy gap in addressing climate-induced displacement at the domestic level.²⁸

²⁷ Foreigners Act 1946

²⁸ Constitution of India

Challenges and Suggestions:**Motives, attribution and causation:**

A fundamental doctrinal issue in the efforts to protect climate-displaced individuals is to create causality and individualised risk in situations where climate change is interlinked with socio-economic and political processes.²⁹ The presence of such intertwined effects of both poverty and climate on decision-makers can cause the representation of movements to be defined under characterized labels as economical migration instead of forced displacement, thus leaving them outside of protection regimes despite the presence of climate change as a life determinant.

The issue of political opposition and sovereignty:

States tend to be hesitant to widen formal definitions of refugees as well as to establish new binding commitments to climate-displaced individuals because they worry that open-ended liabilities and home-country criticisms. Part of the reason behind this political sensitivity is why treatment by such mechanisms as the Nansen Initiative and GCM have focused on soft-law commitments and on toolkits as opposed to new treaties, and why the issue of climate-related mobility is still discussed more as an adaptation or development problem than as a right-based protection obligation.³⁰

Normative and policy recommendations:

First, there should be an interpretive development of the existing refugee law, which will draw upon the Legal Considerations and national jurisprudence of the UNHCR in identifying that the impacts of climate can be, in some cases, intertwined with persecution (as in a situation where a shortage of resources exacerbates conflict directed at a specific ethnic or social group) or the discriminatory state negligence in climate-adaptation. Special attention should be paid to the judgment on the concept of the active law of concrete climate conditions, and the judiciary and other administrative bodies should adhere to the interpretation of the text and the meaning of the 1951 Convention and regional resources.³¹

Second, states must tighten and align the complementary and subsidiary protection frameworks

²⁹ Academic Article

³⁰ Migration policy source

³¹ UNHCR, Legal Considerations regarding climate change(2020)

and based on the human rights law, explicitly designate life-threatening environmental degradation and climate-related disasters as possible antecedents to non-refoulement, in the same vein as the Human Rights Committee suggested in *Teitiotia*. It would not involve any amendment of the Refugee Convention but would institutionalise a more structured human-rights-based safety net, targeting those who do not fit the definition of refugee but who also face serious harm upon return should they be repatriated.

Third, regional organisations ought to use the examples of the Kampala Convention and Cartagena Declaration to create a binding or at least strong soft-law instrument on climate-related displacement whichever suits their geographic and political jurisdictions. The SAARC or sub-regional blocs in South Asia might look at modalities of cross-border disaster displacement, such as temporary security, labour mobility programmes and planned relocation, which would be exceptionally more pertinent to India, Bangladesh and the low-lying coastal communities.

Fourth, migration and climate policies ought to be more closely connected by means of including mobility options in the national adaptation plans and climate strategies considering the Task Force on Displacement, PDD and GCM recommendations. This entails producing humanitarian visas, seasonal and circular migration, and localised-based relocation initiative that enables vulnerable populations to relocate before the crises become emergent with the backing of climate finance and development aid.

Lastly, there is a need to enhance data gathering and involvement: governments and highly developed organisations are now encouraged to invest in disaggregated data on displacement as a result of climate change and engage the affected communities, such as indigenous and marginalized groups, in the development of relocation and protection strategies, as outlined by the Protection Agenda and by the IPCC. The top-down risk of resettlement of climate may be avoided through meaningful involvement, which can advance the right-respecting solutions that will sustain cultural affiliations and livelihoods to the greatest extent possible.³²

Conclusion:

Climate-induced displacement exposes a major gap in international law. While existing frameworks offer partial protection, they fail to address the scale and nature of the problem.

³² GCM

Without urgent reforms, climate displacement risks becoming a major human rights crisis of the 21st century. The issue is not merely a legal gap but a structural failure of international law. A coordinated legal and policy response is therefore essential.

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