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4. Climate change-induced displacement, migration and international law

Nicola Jägers¹

1. INTRODUCTION

On September 23, 2020, the UN Human Rights Committee (HRC) issued a landmark ruling in the case of *Teitiota v New Zealand*.² The supervisory body, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), acknowledged that international human rights law may require states to refrain from returning climate-induced displaced persons if they face a real risk of threat to their life because of the adverse effects of climate change. The case was filed by Mr Teitiota, a national of Tarawa in the low-lying Pacific island state of Kiribati. He claimed that the effects of climate change and sea-level rise forced him to migrate from Kiribati to New Zealand. The situation in Tarawa has become increasingly perilous due to sea-level rise caused by global warming. Due to saltwater contamination and overcrowding on Tarawa, fresh water has become scarce. Inhabitable land has eroded, resulting in a housing crisis and violent land disputes that have led to numerous deaths. Attempts to combat sea-level rise have so far largely been ineffective. Mr Teitiota and his family relocated to New Zealand, claiming Kiribati had become an untenable and violent environment for them. In New Zealand, he faced deportation back to Kiribati. He invoked Article 6 ICCPR, claiming that deportation back to the small island state would result in a violation of his right to life. In its view, the HRC explicitly stated that climate change may lead to the displacement of individuals and trigger the obligation of *non-refoulement* by receiving states. It held that “[...] the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.”³ In this specific case, the HRC did not acknowledge the claim for protection as the applicant was not able to meet the high

¹ This chapter builds on an earlier version published in the first edition of this volume, written together with Dr Mariya Gromilova.

² Human Rights Committee (HRC), Case *Ioane Teitiota v New Zealand*, Communication No 2728/2016 Views of 24 October 2019.

³ *Ibid* at para 9.11.

burden of proof.⁴ Nevertheless, the case has been heralded as a major step forward in patching together a regime of protection for climate refugees, as the HRC acknowledged that states may have an obligation to receive people on the move as a result of the effects of climate change.

This chapter presents an analysis of the degree of protection currently afforded under international law to the growing number of people forced to relocate as a result of climate change. It is predicted that the small island state of Kiribati will be completely submerged in the next 10–15 years.⁵ Kiribati is, however, just one example of the impact of the adverse effects of climate change. The changing climate and the disasters associated with climate extremes are driving human mobility in many parts of the world.

As early as 1990, the Intergovernmental Panel on Climate Change (IPCC) predicted that one of the greatest impacts of climate change will be on human migration.⁶ The Internal Displacement Monitoring Centre estimates that, on average, 21.7 million people were internally displaced each year in the period 2008–16 by weather-related disasters.⁷ This figure only concerns internal displacement and does not take on board the people crossing borders because of sudden and slow-onset adverse effects of climate change. The actual number of people that have moved due to climate change is thus likely much higher.⁸ Estimating the precise number of those likely to be displaced because of global warming is complex given the fact that (a combination of) multiple drivers can cause people to relocate. An often-quoted prediction is that the number will range between 50 million and 350 million people by 2050.⁹

Climate change is an existential threat to small island states in the Pacific region and low-lying coastal states such as Bangladesh. Due to its geographical and spatial location, Bangladesh is already among the most environmentally vulnerable regions, with around 20 percent of the land one meter or less above the sea level. According to the 2007 UN Fourth Assessment Report of the IPCC, a one-meter rise of sea level will cost Bangladesh up to 17 percent of its land, and will displace at least 35 million

⁴ Not all members of the HRC agreed that the burden of proof in such a case should rest entirely on the applicant. In their dissenting opinions, Committee-members Sancin and Laki pointed out that in such a situation the burden of proof should rest on the state. See para. 5 of their dissenting opinions.

⁵ *Ibid* at paras 2.4, 7.2, 9.10 and 9.12.

⁶ IPCC, *Climate Change: The IPCC 1990 and 1992 Assessments (IPCC First Assessment Report Overview and Policymaker Summaries, and 1992 IPCC Supplement)* 55.

⁷ See Internal Displacement Monitoring Centre (IOM), “Global Report on Internal Displacement” (Geneva, 2017), p.3. Available at www.internal-displacement.org/global-report/grid2017/pdfs/2017-GRID.pdf, accessed 8 July 2021.

⁸ Predictions of the number of people driven to migrate due to climate change are not uncontested. See *infra* para. 2.1. Notwithstanding the pitfalls of predicting the number of people on the move due to climate change, it is clear that the problem is increasing and in need of a legal and policy response.

⁹ United Nations, *Report of the Secretary-General on Climate Change and its Possible Security Implications*, 11 September 2009, UN document A/64/350, 15.

people by 2050.¹⁰ The risk for small islands is even more dramatic: it is predicted that a number of small low-lying islands located in both the South Pacific and Indian Oceans will be wiped off the face of the earth in the next 50–100 years. By 2100, it is estimated that 48 islands overall will be lost to the rising ocean.¹¹ It is clear that climate-induced displacement is not just a matter of future concern. The evidence illustrates that climate change is already causing population movements. Due to sea level rising, eight islands have already submerged and two more are on the brink of disappearing, prompting a wave of migration to larger countries.¹² In 1995 half of Bhola Island in Bangladesh became permanently flooded, forcing half a million people to relocate.¹³ In 1999 two of Kiribati's islands, Tebua Tarawa and Abanuea, disappeared because of sea-level rise.¹⁴ Other evidence is the disappearance of Lohachara Island in December 2006, which left 10,000 people homeless.¹⁵

Besides people relocating as a result of land erosion due to the rising sea level, other slow-onset effects of climate change such as salinization of groundwater resources, changing precipitation patterns, and desertification, together with the increasing frequency and intensity of extreme weather events, are driving human mobility.¹⁶ This is especially affecting developing countries, where many people are already in a vulnerable position.

People already relocated, or those who will be, are going to suffer a significant infringement of basic human rights, and need to be protected. At the same time, they may present a threat to neighboring states, as a massive flow of migrants is fraught with the risks of conflict and economic instability. Therefore, it is crucial that certain proactive measures are taken to address these risks. The search for effective ways to protect people displaced by climate change and to allocate responsibility for their protection attracts increasing attention from scholars and the international community. Yet the way to tackle the problem remains unclear. Numerous obstacles hinder

¹⁰ ML Parry et al. (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2007) 488.

¹¹ Amrita Deshmukh, "Disappearing Island Nations Are the Sinking Reality of Climate Change," Qrius, May 17, 2019. <https://qrius.com/disappearing-island-nations-are-the-sinking-reality-of-climate-change/>, accessed 8 July 2021.

¹² PD Nunn, A Kohler, and R Kumar, "Identifying and Assessing Evidence for Recent Shoreline Change Attributable To Uncommonly Rapid Sea-Level Rise in Pohnpei, Federated State of Micronesia, Northwest Pacific Ocean," [2017] 21 *Journal of Coast Conservation*; Eleanore Ainge and Sean Gallagher, "One Day We'll Disappear: Tuvalu's Sinking Islands," *The Guardian*, May 16, 2019. www.theguardian.com/global-development/2019/may/16/one-day-disappear-tuvalu-sinking-islands-rising-seas-climate-change, accessed July 8, 2021.

¹³ Emily Wax, "In Flood-Prone Bangladesh, a Future that Floats," *Washington Post*, September 27, 2007.

¹⁴ Sci/Tech, "Islands Disappear under Rising Seas," *BBC News*, June 14, 1999, <http://news.bbc.co.uk/2/hi/science/nature/368892.stm>, accessed October 3, 2012.

¹⁵ "Disappearing World: Global Warming Claims Tropical Island," *The Independent*, December 24, 2006.

¹⁶ UN Doc. A/HRC/38/21, April 23, 2018, pp.4–5.

the inclusion of people displaced by climate change into existing legal frameworks. At the same time, the urgency of the problem demands that the international community, policy-makers and scholars, come up with a solution concerning the status and protection of people displaced by climate change.

The current chapter therefore aims to provide an overview of the contemporary state of certain relevant sections of international law with regard to the issue of climate-induced displacement with a focus on international human rights law, to outline the most problematic points and to show the limitations and opportunities of the existing approaches to the problem of climate-induced displacement. The focus is on international human rights law because it has been put forward that “[i]n the context of climate change-related cross-border movement, international human rights law, norms and standards offer the most comprehensive, people-centred and flexible framework for the protection of all migrants in vulnerable situations, including those affected by climate change.”¹⁷

The first main section of the current chapter will focus on the causal relationship between climate change and displacement of people. It will discuss how climate change especially affects the most vulnerable regions in the world, forcing people in these regions to relocate. This section will reveal some of the main obstacles of legal recognition of people displaced by climate change in international law. Subsequently, the chapter addresses the issue of protection of people displaced by climate change and the issue of responsibility for such protection under international law. Existing international legal frameworks that can potentially be applied for the protection of these people will be discussed. The limitations and opportunities of international refugee law, international environmental law, and, especially, international human rights law are addressed.

In the conclusion to this chapter, the current state of international law and its capacity to deal with the issue of climate-induced displacement, as well as the most controversial issues which still remain unclear, are discussed. Additionally, some possible solutions to the problem and their feasibility are outlined.

2. LINKING CLIMATE CHANGE AND MIGRATION

The problem of climate-induced displacement is increasingly recognized, and currently is at the forefront of many international discussions. In fact, in its Strategic Directions for 2017–21, the UN refugee organization the UNHCR set as one of its key objectives to “contribute to advancing legal, policy and practical solutions for the protection of people displaced by the effects of climate change and natural disasters,

¹⁷ Ibid, p.10, para. 37.

in recognition of the acute humanitarian needs associated with displacement of this kind, and its relationship to conflict and instability.”¹⁸

It is acknowledged that people who will have to relocate need assistance and protection. However, the way to tackle the problem remains unclear. There are a number of obstacles in conceptualizing the issue: recognizing people displaced by climate change under international law; granting them timely protection; and determining those who are responsible for this protection.

2.1 Causal Relationship

An underlying issue that hampers tackling the issue of climate-induced displacement, and that runs through the search for a potentially relevant legal framework, lies in the fact that the relationship between climate change and migration is not uncontested. Some scholars argue that there is no direct causal link between climate change and relocation. According to these scholars, especially in cases with slow-onset disasters, it is impossible to claim that climate change was a primary factor in the person’s decision to move, as the reasons for relocation are almost always multiple.¹⁹ Environmental factors are closely linked to economic, political, and social ones. Therefore, environmental degradation is undoubtedly a driver of displacement but it is unlikely that it is the unique cause, as other conditions, such as unemployment, armed conflict, or poverty, can also drive people’s decisions to migrate.²⁰

In case of rapid-onset disasters—such as, for example, a tsunami—or industrial accidents, the link is identifiable. Still, critics argue that with respect to these types of climate-related impacts, the relocation will have an internal and temporal character, which is not a new occurrence. People displaced internally are able to receive protection and assistance within the existing international legal regime²¹ and, therefore, some scholars claim that there is no need to recognize them distinctly.²²

An associated problem, which complicates the establishment of a clear link between climate change and migration, is the lack of statistics on the ongoing climate-induced movement across borders. This, of course, hampers the process of drawing further conclusions. The science of climate change is complex enough, and

¹⁸ UNHCR, UNHCR’s Strategic Directions, 2017, www.unhcr.org/5894558d4.pdf, accessed July 1, 2021.

¹⁹ Hugo Graeme, “Environmental Concerns and International Migration” (1996) 30(1) *International Migration Review* 110–13.

²⁰ Benoit Mayer, “The International Legal Challenges of Climate Induced Migration: Proposal for an International Legal Framework” (2011) 22(3) *Colorado Journal of International Environmental Law and Policy* 10.

²¹ *Guiding Principles on Internal Displacement* 1998, UN Doc. E/CN.4/1998/ 53/Add.2. Critics, however, argue that the protection offered by the *Guiding Principles* falls short. See *infra*.

²² David Keane, “The Environmental Causes and Consequences of Migration: A Search for the Meaning of ‘Environmental Refugees’” (2004) 16 *Georgetown International Environmental Law Review* 211.

it still cannot accurately predict the way climate change will affect our ecosystem. Making prognoses is even more problematic when it comes to interaction between meteorological and social factors. Methodologically, it is complicated to establish how exactly people will respond to climate change, and to estimate the precise numbers of those who will relocate. Among the problems are: the lack of a definition for people displaced by climate change, which will be discussed *infra*; plausible assumptions about human behavior and ignorance of changes in human behavior and possibility of adaptation; and the above-mentioned issue of multi-causality.²³ Nevertheless, these complexities do not stop scientists' attempts. Predictions on climate-induced migration range between 25 million and 1 billion people by 2050.²⁴ According to Myers, the total number of people at risk of sea-level rise in Bangladesh is around 26 million, in Egypt 12 million, in China 73 million, in India 20 million, and in several other parts of the world 31 million, making an aggregate total of 162 million. In addition, at least 50 million people could relocate due to droughts and other climate change impacts. In total, Myers predicted 212 million people displaced by climate change by 2050.²⁵ These predictions are not uncontested. The Stern Review on the Economics of Climate Change criticized Myers' methods but nonetheless agreed with the conclusion that there will be 200 million displaced by 2050.²⁶ The IPCC and NASA predict one billion people living in coastal areas by 2050 are at risk of sea-level rise and 1–3 billion people might be living in areas outside a favorable temperature niche by 2070.²⁷ The controversy around how to predict the number of people that will be on the move due to climate change reveals the need for improved data collection. In any case, it is clear that climate change in combination with other factors will increase the displacement of people.²⁸ As will be discussed, this will especially affect those already in a situation of vulnerability.

Besides the alarming prognoses for the future, there is, as mentioned earlier, some evidence that climate change already causes population movement. According to the International Organization for Migration (IOM), gradual and sudden environmental changes are already resulting in substantial population movements; in 2020, 23.9 million persons were internally displaced by extreme weather events, compared to 8.5 million displaced by conflicts and violence over the same period.²⁹

²³ Frank Biermann and Ingrid Boas, "Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees" (2007) 33 *Global Governance Working Paper* 9.

²⁴ R Bird et al., *Human Tide: The Real Migration Crisis* (Christian Aid 2007) 5, 6.

²⁵ Norman Myers, "Environmental Refugees: A Growing Phenomenon of the 21st Century" (2002) 357 *Philosophical Transactions: Biological Science* 609–11.

²⁶ Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press 2006) 77.

²⁷ IOM, Internal displacement in the context of the slow-onset adverse effects of climate change, submission to the Special Rapporteur on the human rights of internally displaced persons, 2020, see footnotes 141, 142.

²⁸ UN Doc. A/HRC/38/21, note 16, para. 10.

²⁹ See IOM, note 27, p.35.

The previously mentioned examples of Bangladesh and several small island states show that climate-induced displacement is not just a matter of future concern, but a currently existing threat which is only advancing. Thus, while the discussions on the complexity of the relationship between climate change and migration, and the paramount importance of the social drivers to environmental changes, are bound to go on for decades to come, climate change is clearly a factor that influences migration. Therefore, it seems more important to focus on the particular impacts of climate change and to look at the way climate change currently affects and will continue affecting people.

2.2 Impacts of Climate Change on Migration in Different Regions of the World

It is very likely that at a certain point the consequences of climate change will be visible worldwide, and that each continent will suffer its grave impacts.³⁰ Nevertheless, currently and in the nearest future, the influence of climate change on migration is and will be most notable in already vulnerable regions of the world. Some of these effects can already be observed. The alarming rate of environmental change will sharpen them, and more than likely bring new ones. The majority of scientists agree that global temperatures will continue to rise throughout the following decades. The IPCC forecasts a temperature rise of 2.5 to 5°F (1 to 3°C) over the next century.³¹ While seemingly insignificant, such an increase will have dramatic consequences for some regions. Among the most direct effects of the temperature change are sea-level rise, changes in rainfall patterns, negative implications for human health due to the risks of heat-related illness, and many more associated effects, such as floods, droughts, increasing numbers of storms, economic losses, land losses, and the changing shapes of landscapes. Notwithstanding the fact that in general the effects of climate change will be felt worldwide, it is possible to note several areas which are particularly vulnerable to climate change effects. Among them are the small island states, coastal zones, and regions of Africa and Asia.³² It is these hotspots that will be especially affected by climate-induced relocation. Any of the above-listed climate change effects could cause inhabitants to flee these regions.

Due to geographical location and population density, South and East Asia are among the spots greatly exposed to large-scale forced migration. Many Asian urban cities, such as Shanghai and Calcutta, are dangerously threatened by tropical cyclones

³⁰ IPCC, Summary for Policymakers in TF Stocker et al. (eds), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2013).

³¹ Ibid.

³² Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33(2) *Harvard Environmental Law Review* 355.

and storms.³³ There is evidence that the intensity and frequency of many extreme weather events in the region, such as heat waves, tropical cyclones, prolonged dry spells, intense rainfall, tornadoes, snow avalanches, thunderstorms, and severe dust storms, is only increasing.³⁴ Low-lying and shoreline areas, such as Bangladesh, are at the top of the risk group. Another climate change-related threat that Asia faces is the melting of glaciers. This will increase the risk of flooding during the wet season and reduce dry-season water supplies to one-sixth of the world's population, predominantly in the Indian sub-continent and in parts of China.³⁵ Africa is another target of climate-induced migration, because, while Asia is submerging, low and mid latitudes are exposed to other extremes. North Africa and the Sahel, the horn of Africa, and South Africa are extremely vulnerable to drought. Changing patterns of rainfall place food security in Africa in serious danger. Desertification is currently affecting 46 of 57 nations in Africa.³⁶ The above-stated risks and changes eventually will make certain parts of the world unapt for living, by causing food and water supplies to become more unreliable and increasing the frequency and severity of floods and storms, and through erosion and inundation of coastal areas. These will force people to search for new places that can provide them with means of living.

Given the urgency of the problem and the existing prognoses of the top science bodies and the UN agencies, the debates on whether climate change is a direct driver for population movement, or arguments to the contrary that such displacement will be indirect and multi-faceted, do not seem to be appropriate. Directly or indirectly, climate change will create massive displacement and put global and regional stability at risk. What deserves particular attention is that displacement of people is associated with significant deprivation of basic human rights and the inability to acquire sufficient assistance and financial support from host states, as well as the risks of conflicts over the reduced availability of resources. Therefore, these people require attention and protection, and need to be placed on the legal and political agenda. However, the disagreement on causality creates obstacles to recognizing displaced people under international law and reaching agreement on which elements should be incorporated in the definition of this group of people. Until there is agreement with regard to the issue of causality, the obstacles in approaching people displaced by climate change will remain. In the light of current analysis, the lack of a definition presents a major obstacle. Therefore, before moving to the question of whether existing legal frame-

³³ Munich Re Group, "Megacities—Megarisks: Trends and Challenges for Insurance and Risk Management" (Münchener Rückversicherungs-Gesellschaft 2004) 41, 76.

³⁴ IPCC, 2007: Summary for Policymakers in ML Parry et al. (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2007) 469–506.

³⁵ Stern, above note 26 at 56.

³⁶ IPCC, *Climate Change and Land. An IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* (SRCCCL 2019).

works are able to deal with the issue of climate-induced displacement, it is crucial to clarify what group of people is implied in the further analysis in this chapter.

2.3 People Induced to Displacement by Climate Change

Although terms and concepts such as climate change-induced displacement, environmental or climate change refugees, environmental migration and environmental migrants have been widely used in the ongoing debates on climate change, there is no universally accepted definition of people displaced by climate change.

There have been a lot of attempts to define the category of people displaced by climate change. El-Hinnawi was the first to use the term environmental refugee in his work for the UN Environmental Programme (UNEP) during the 1980s. According to his definition, environmental refugees are “[p]eople who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by man) that jeopardized their existence and/or seriously affected the quality of their life.”³⁷

El-Hinnawi includes three major types of environmental refugees in his definition. First, the definition includes people who are temporarily dislocated due to disasters, whether natural or anthropogenic. The major characteristic of this group is the ability to return to their habitats once the environmental disruption is over and it is safe to return. The second group consists of people who have been permanently displaced due to drastic environmental changes. Finally, the third type are the people who migrate due to the gradual deterioration of environmental conditions.³⁸

Myers suggests an even broader definition and describes environmental refugees as “people who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems, together with associated problems of population pressures and profound poverty.”³⁹

Some have forcefully pleaded for using the term “climate refugee.” For example, Behman and Kent argue that the term “refugee” must not be interpreted in a formalistic legal manner and should “apply to those displaced either because a state cannot, or for whatever reason will not, provide for their needs where climate change has affected the means of subsistence.”⁴⁰ They state that “climate refugee” is appropriate as it “recognises the seriousness of their predicament, their agency, and the deserving nature of their claim to protection in a way that terms such as migrant and displaced

³⁷ Essam El-Hinnawi, *The Environmental Impacts of Production and Use of Energy* (UNEP 1985) 4.

³⁸ *Ibid.*

³⁹ Norman Myers, *Environmental Refugees: An Emergent Security Issue* (OSCE 2005) 6–7.

⁴⁰ Simon Behrman, Avidan Kent, *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 11.

person simply do not.”⁴¹ While using this term sends an important signal, it does not reflect the legal and political reality, as will be shown in the following sections. The debate on the terminology is by no means settled, as can be deduced from the 2018 UN Global Compact for Safe, Orderly and Regular Migration.⁴² While this instrument recognizes the nexus between natural disasters and human migration, it avoids explicitly naming the affected group of people—whether as migrants or refugees.

In this chapter we build upon the definition developed in the context of the EACH-FOR project, which was a research project devoted to environmental change and forced migration scenarios launched by the European Commission.⁴³ According to its definition, the term Environmentally Displaced Persons (EDPs) covers three categories: environmental migrants (people who choose to move voluntarily from their usual place of residence primarily due to environmental concerns or reasons); environmental displacees (people who are forced to leave their usual place of residence because their lives, livelihoods, and welfare have been placed at serious risk as a result of adverse environmental processes and events (natural and/or triggered by people; and development displacees (people who are intentionally relocated or resettled due to a planned land use change).⁴⁴ This approach provides the broad interpretation of factors that constitute environmental displacement, as it covers the wide range of situations in which the displacement might occur, including external and internal, forced and voluntary, permanent and temporary relocation, relocation as a response to rapid-onset and slow-onset environmental disasters, and relocation instigated by development projects.⁴⁵ Since, in this chapter, the only focus is on displacement related to climate change, we will use the term Climatically Displaced Persons (CDPs).

⁴¹ Ibid 12.

⁴² Available at: https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf, accessed July 1, 2021.

⁴³ The EACH-FOR project ran for two years and focused on the environmental change and forced migration scenarios. The project was supported by the European Commission and carried out by a consortium of researchers between January 2007 and March 2009. More information is available at <https://migration.unu.edu/research/migration-and-environment/environmental-change-and-forced-migration-scenarios-each-for-2.html#outline>, accessed June 24, 2021.

⁴⁴ EACH-FOR, *Environmental Change and Forced Migration Scenarios (Synthesis Report 2009)* 8–9, www.each-for.eu, accessed June 24, 2021.

⁴⁵ First of all it avoids the use of the term ‘refugee’; second, in comparison to the approach of the UNHCR, it includes development displacement.

3. THE EXISTING LEGAL FRAMEWORKS FOR THE PROTECTION OF PEOPLE DISPLACED BY CLIMATE CHANGE

As was mentioned in the previous section, the category of people induced to displacement by climate change is relatively new, and is not directly recognized under international law. However, as the number of these people rapidly grows it becomes clear that most are from developing countries and are already vulnerable. Their human rights are under great threat and there is an urgent need for a mechanism to establish who is responsible, to assist and protect them. This section aims to review existing international legal frameworks, to see whether they offer protection to people displaced due to climatic reasons, to establish whether they provide certain clarity with regard to responsibility towards these people, and to see whether these frameworks can play a pre-emptive role in dealing with the issue of climate-induced displacement. Before addressing the main focus of this chapter—the human rights regime—the extent to which international refugee law and environmental law is able to accommodate people displaced due to climate change will be discussed.

3.1 International Refugee Law

The relevant legal framework at the international level for the protection of displaced populations is refugee law, especially the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention) and its Optional Protocol.⁴⁶ The Convention offers strong protection to people fleeing across borders as it contains the principle of *non-refoulement*; this prevents forcible return to a country of persecution and grants refugees a legal status. Currently, 147 states have ratified either one or both of these instruments, and thus are bound by the provided definition of refugee. However, as will be observed in this section, when it comes to CDPs, the applicability of the Refugee Convention turns out to be highly problematic. In order to analyze what are the main obstacles for people displaced by climate change to fit into the refugee law regime, the definition of refugees under the Refugee Convention and Protocol will need to be recalled.

Article 1 of the Refugee Convention states that the refugee status applies to any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴⁷

⁴⁶ UN Convention Relating to the Status of Refugees of 28 July 1951, 189 UNTS 150.

⁴⁷ *Ibid.*

All these requirements have to be met in order to gain refugee status.

To help governments and courts determine who can qualify as a refugee, in 1979 the UNHCR produced the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook).⁴⁸ The interpretation of the refugee definition in the UNHCR Handbook, which is undoubtedly the most authoritative interpretation of the 1951 Refugee Convention and the 1967 Refugee Protocol, excludes victims of natural disasters and rules out their acquiring refugee status.⁴⁹ Although a lot of scholars, lawyers, and governments use the terms “environmental refugee” and “climate change refugee,” and try to apply refugee law for their protection,⁵⁰ there are a number of significant obstacles to qualifying people displaced by climate change as refugees under international law.

Before turning to these obstacles, it is important to note that several regional instruments contain a broader definition of refugee. Among notable examples are the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), the 1984 Cartagena Declaration on Refugees (Cartagena Declaration) of Latin America, and the 1994 Arab Convention on Regulating Status of Refugees in Arab Countries (Arab Convention).

All these regional instruments follow the refugee definition found in the 1951 Refugee Convention, but they also provide for additional circumstances. The OAU Convention includes any person compelled to leave his/her country because of “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.”⁵¹ Similarly, the Cartagena Declaration extends the definition of refugee to persons who have fled their country “because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”⁵²

The Arab Convention even mentions natural disasters among the reasons for acquiring refugee status, and defines a refugee as

any person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of the sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or

⁴⁸ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (HCR/IP/4/Eng/REV.1, Geneva 1992).

⁴⁹ *Ibid* at para. 39.

⁵⁰ Kara K Moberg, “Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection” (2009) 94 Iowa Law Review 1114. See also Behrman and Kent, *supra* note 40.

⁵¹ Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) Organization of African Unity 1969, 1001 UNTS 45, Art. 1(2).

⁵² Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama on 22 November 1984, Section III (3).

grave events resulting in major disruption of public order in the whole country or any part thereof.⁵³

It should be noted, however, that so far no states have ratified the Arab Convention and therefore it has no legal force.⁵⁴ The Cartagena Declaration is a non-binding instrument. Nevertheless, most of the Latin American states apply the definition as a matter of practice and some have incorporated the definition into their own national legislation.⁵⁵ The OAU Convention is a binding legal instrument and is a part of regional law.

In sum, several regional instruments provide for a broader definition by including persons that flee events that seriously disturb public order. Arguably, this may include CDPs. This will be further discussed *infra*. But as these regional instruments also build on the definition as provided in the 1951 Refugee Convention, the next section will focus on that definition. Each component of the definition will be critically assessed in order to identify problems with the application of the refugee definition to people displaced by climate change. Moreover, the above-mentioned regional instruments (the OAU Convention and the Cartagena Declaration) will be discussed as well, in order to analyze whether a broader refugee definition can have some added value for those who have to relocate due to climate change effects.

3.1.1 Requirement of exile

To meet the refugee definition under the Refugee Convention it is required that the person is outside his or her country of origin. This immediately excludes those who have not moved yet, or have been internally displaced. According to prognoses, much of the movement provoked by climate change, especially at the early stages, will be internal. International refugee law does not provide its protection to a significant number of people induced to displacement. Internally Displaced People (IDP) are subject to a totally different legal mechanism and will be analyzed *infra*, addressing the applicability of human rights law to the issue of climate-induced displacement.

Another concern that follows from the requirement of exile is that it implies that the person is entitled to protection only when the relocation has already taken place. Yet, as has been emphasized, there is a strong necessity for a pre-emptive approach to the protection of people at risk of climate-induced displacement. Thus, there is an obvious drawback to refugee law with regard to the issue of climate-induced displacement.

The same is true with regard to the regional instruments, as in this respect they duplicate the Refugee Convention.

⁵³ Arab Convention on Regulating Status of Refugees in the Arab Countries, adopted by the League of Arab Countries in 1994, Art. 1.

⁵⁴ Due to the fact that the Arab Convention has not been ratified, we will not deal with it below.

⁵⁵ Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism" (1991) 3(2) *International Journal of Refugee Law* 189.

3.1.2 Persecution and its grounds

A major obstacle to placing climate-induced displacement within the framework of international refugee law is the difficulty in characterizing natural disasters and other weather-related events as persecution. Rising sea levels, salination, and increasingly frequent storms, earthquakes, and floods may put those on the move in a refugee-like situation, but such events do not constitute persecution in accordance with the meaning which has been ascribed in international and domestic law.⁵⁶

The UNHCR Handbook affirms that “[t]here is no universally accepted definition of ‘persecution,’ and various attempts to formulate such a definition have met with little success.”⁵⁷ Article 33 of the 1951 Refugee Convention states that threat to life or freedom on account of race, religion, nationality, political opinion, or membership of a particular social group is always persecution. Furthermore, other serious violations of human rights, based on the same grounds, would also constitute persecution.⁵⁸ Whether other prejudicial actions or threats can be considered as persecution will depend on the circumstances of each individual case.⁵⁹

According to the UNHCR, “persecution is normally related to actions by the authorities of a country.”⁶⁰ In other words, if one is searching for recognition as a refugee because of environmental impairment, the “persecutor” should be identified. An applicant must show that the cause of harm lies in the actions of government and that the government is unwilling or unable to prevent continued persecution. However, in the case of climate change it is nearly impossible to establish this link. Moreover, the majority of CDPs live in developing countries, which are not among those countries that have contributed to global warming and which should be held responsible for it.⁶¹

On the other hand, as the UNHCR Handbook does not provide the definition of persecution, there is no direct impediment for considering environmental harm as persecution. There are situations where we can acknowledge environmental harm as persecution. One is if, in a situation of sudden- or slow-onset disaster, authorities deny any kind of assistance and protection to certain people because of their race, religion, nationality, membership of a particular social group, or political opinion and consequently expose them to treatment amounting to persecution.⁶² Another possible

⁵⁶ Jane McAdam and Ben Saul, “An Insecure Climate for Human Security? Climate-Induced Displacement and International Law” in A Edwards and C Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010).

⁵⁷ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (HCR/IP/4/Eng/REV.1, Geneva, January 1992) para. 51.

⁵⁸ Convention relating to the Status of Refugees 1951, Art. 33.

⁵⁹ *Supra*, note 57 at para. 52.

⁶⁰ *Ibid.* at para. 65.

⁶¹ Kara K Moberg, “Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection” (2009) 94 Iowa Law Review 1121, 1122.

⁶² Walter Kälin and Nina Schrepfe, “Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches,” UNHCR, *Legal and Protection Policy Research Series*, PPLA/2012/01, 2012, pp.32–3.

scenario where the elements of the refugee definition would be met is a situation of violence or serious human rights violations triggered by disputes over shrinking natural resources if persecutory measures are based on the race, religion, nationality, membership of a particular social group, or political opinion of affected persons.⁶³ In other words, the protection of the 1951 Refugee Convention will only kick in if people are targeted in the context of climate change for any of the relevant five aforementioned grounds. Nevertheless, this kind of correlation will mostly not be found in many cases of climate-induced displacement. The nature of climate change impacts is largely indiscriminate. This means that it is not tied to particular characteristics such as a person's background or beliefs. Even though some areas are more affected by climate change than others, this is on account of their geographical location and not because of the nationality or race of their inhabitants.⁶⁴ The same is true with regard to such categories of people as women and children. Though climate change is expected to affect women and children most, it is not because of their gender or age, but rather due to the fact that they are often in a situation of vulnerability.

The definition does not leave much room for interpreting the reasons for persecution, but instead it includes an exhaustive list of race, religion, nationality, membership of a particular social group, or political opinion, clearly setting the boundaries of the legal application of the Refugee Convention.⁶⁵

The conclusion that the Refugee Convention does not offer protection to those on the move due to climate change was confirmed in 2015 by the Supreme Court of New Zealand. The case of Mr Teitiota discussed in the introduction to this chapter was brought before the Supreme Court, which ruled that the terms of the Refugee Convention do not allow for protection absent demonstrable persecution aimed at the person seeking asylum.⁶⁶

As has been mentioned above, regional instruments contain a broader refugee definition. Under the OAU Convention, the refugee definition includes those fleeing "events seriously disturbing public order in either part or the whole of his country of origin or nationality."⁶⁷ The Cartagena Declaration contains a similar provision. Lopez suggests that even though both instruments were not designed for protection of climate migrants, these people can argue that climate change is an event seriously disturbing public order.⁶⁸ Yet, this claim raises certain doubts. While sudden-onset

⁶³ Ibid 33.

⁶⁴ Jane McAdam, "Climate Change Displacement and International Law: Complementary Protection Standards" (2011) UNHCR Legal and Protection Policy Research Series 13, www.unhcr.org/4dff16e99.html, accessed July 8, 2021.

⁶⁵ Angela Williams, "Turning the Tide: Recognizing Climate Change Refugees in International Law" (2008) 30(4) *Law & Policy* 508.

⁶⁶ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC, 20 July 2015.

⁶⁷ Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) Organization of African Unity 1969, 1001 UNTS 45, Art. 1(2).

⁶⁸ Aurelie Lopez, "The Protection of Environmentally-Displaced Persons in International Law" (1993) 18 *Yale Journal of International Law* 389.

disasters (for example, tsunamis or floods) might arguably be considered as events seriously disturbing public order, with regard to slow-onset disasters, such as droughts and sea-level rise, this is hardly the case. Only if a country affected by a severe drought declares a national emergency or formally identifies the disaster as one disrupting public order might it be possible to claim that people induced to relocate should receive temporary asylum or refugee status in another country.⁶⁹ Otherwise, slow-onset disasters are hard to qualify as events seriously disturbing public order. Although in Africa it has been common to provide temporary protection to people who cross an international border to flee a natural disaster (this occurred for example when Congolese people fled to Rwanda following the eruption of Mount Nyiragongo in 2002), African governments have never characterized this as an obligation arising from the OAU Convention. Furthermore, the wording of both regional instruments seems to require evidence of an actual threat:⁷⁰ the OAU Convention refers to the person that “was compelled to leave”; the Cartagena Declaration extends to people “who have fled their country” for certain reasons.⁷¹ This means that these instruments cannot play a pre-emptive role in the protection of people at risk of climate-induced displacement.

3.1.3 Right to return

Another obstacle to placing climate displacees within the legal framework of refugee law both at the international and the regional level is linked to the fact that the refugee concept implies a right to return once the persecution that triggered the original flight has ceased.⁷² It seems obvious that in extreme cases of sea-level rise, when the whole state may disappear, there will simply be no possibility for displaced people to go back.

3.1.4 Other obstacles

Aside from the definitional obstacles identified above, complications exist on the policy level. Namely, the UNHCR does not encourage an extensive interpretation of the existing definition. The UNHCR is concerned that expanding the current definition of refugee “would possibly lead to an erosion of the currently valid international refugee protection regime.”⁷³ According to the UN agency, a modification of the refugee definition may have as a consequence a renegotiation of the 1951 Refugee

⁶⁹ Michelle T Leighton, *Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons* (German Marshall Fund of the United States 2010) 4.

⁷⁰ McAdam, above note 64 at 15.

⁷¹ OAU Convention, Art. 1(2), Cartagena Declaration, Section III(3).

⁷² Oli Brown, *Migration and Climate Change* (IOM 2008) 14.

⁷³ Parliamentary Assembly, *Environmentally Induced Migration and Displacement: A 21st Century Challenge* (Report Committee on Migration, Refugees and Population 2008) para. 55.

Convention, which, in the current political environment, may lead to a lowering of protection standards for refugees under the present definition.⁷⁴

A connected argument of the UNHCR is that the case of environmental refugees involves different types of moral and legal responsibilities in comparison with that of “normal” refugees. “Whereas political and war refugees are victims of their home state or of a regionalized conflict, with no direct responsibility for their plight with the countries that eventually offer refuge, the moral responsibility for climate change is different.”⁷⁵ However, while stating this, the UNHCR does not provide further instructions on ways to tackle the issue.

Furthermore, most of the developed countries are reluctant to recognize the problem. It has been frequently emphasized that the vast majority of people moving as a result of the effects of climate change will come from the countries that are least responsible for climate change, are financially weak, have the least capacity to manage its after-effects, and are not able to implement adaptation programs. Therefore, many developed countries in Europe and North America fear that if the term refugee expands to cover people displaced by climate change, it would compel them to offer these people the same protection as political refugees. Clearly, no country is willing to do so, because of overwhelming costs, lack of territory, and concerns about social order. At the same time, at the international level there are no existing institutions with a direct mandate to address the problem. Currently the UNHCR is charged with providing for refugees, and is already overstretched and unable to cope with its current “stock” of refugees.⁷⁶

It can be concluded that at present refugee law provides little protection for persons displaced across borders by the effects of climate change. The main reason for this is that the Refugee Convention’s definition is not open to interpretations of the grounds for persecution. Thus, it excludes from its scope people displaced by climate change. Furthermore, there is no willingness on the side of the UNHCR and states to extend the protection given to regular refugees to people displaced by climate change, and there is no special institution with a mandate to assist them. Among other crucial limitations are the already mentioned exclusion of people displaced internally and the failure to play a pre-emptive role in dealing with the issue of climate-induced displacement.

At the regional level, existing instruments do not seem to offer a feasible solution either, due to the above-mentioned limitations. Even if agreement is reached that the OAU Convention and the Cartagena Declaration extend to people induced to displacement by climate change, their protection only applies after the displacement took place, and therefore these instruments cannot play a pre-emptive role.

⁷⁴ Ibid.

⁷⁵ Ibid at para. 56.

⁷⁶ Ibid.

3.1.5 National refugee legislation and policies

Interestingly, whereas international and regional refugee law do not provide protection to people induced to displacement by climate change, national laws in certain countries have been more successful in dealing with the problem. Currently, a limited number of European states—Finland, Sweden, and Italy—have adopted asylum law legislation granting subsidiary protection for “environmental migrants.”

The Swedish Aliens Act offers subsidiary protections to a person who is “outside the country of the alien’s nationality, because he or she is unable to return to the country of origin because of an environmental disaster.”⁷⁷ However, according to the Division for Migration and Asylum Policy at the Swedish Ministry of Justice the legislation is limited to sudden disasters and does not extend to cases of continuous environmental degradation. Moreover, the capacity of the Swedish refugee law to grant protection to environmental refugees is hard to estimate.⁷⁸ The relevant provision has never been used with regard to people displaced by climate change and therefore it might prove difficult to protect an excessive number of displaced people, which the scientific prognoses predict.

In Finland according to the Aliens Act, asylum may be granted to the person if “he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe.”⁷⁹ According to the Finnish Immigration Service, the legislation can be extended to cases where the alien’s home environment has become too dangerous for human habitation either because of human actions or as a result of natural disaster. Even though this regulation has not been in frequent use, the Finnish example shows that individual states have the potential to issue immigration and asylum policy to provide legal protection for environmental migrants.⁸⁰

In Italy a legislative decree grants temporary protection measures “in the case of major humanitarian needs, on the occasion of conflicts, natural disasters or other particularly serious events in countries outside the EU.”⁸¹ Nevertheless, the Scandinavian and Italian subsidiary protection of people displaced by environmental disturbance is the exception to the rule, and it does not extend to the international level.

Finally, several countries have adopted policies to address the issue of cross-border displacement because of disasters and climate change. Following an initiative by Switzerland and Norway, 109 states endorsed the so-called Nansen Initiative’s Agenda for the Protection of Cross-border Displaced Persons in the Context of

⁷⁷ SFS2005:716, Ch 4, sec 2§3.

⁷⁸ Benjamin Glahn, “Climate Refugees? Addressing the International Legal Gaps” (International Bar News 2009), available at www.ibanet.org/Publications/, accessed October 5, 2012.

⁷⁹ Finnish Aliens Act 301/2004, Sec 88a(1).

⁸⁰ Glahn, *supra* note 78.

⁸¹ Art. 20 of Legislative Decree nr 286 of 25.07.1998.

Disasters and Climate Change.⁸² The focus is not on developing a new instrument but rather on providing and supporting integration of practices aimed at the needs of people displaced across borders because of disasters and climate change.

3.2 Environmental Law Approach

Another way to approach the problem of climate-induced displacement is through international environmental law, as it lays down the general responsibility of states for environmental damage and deals specifically with the issue of climate change. Increasingly environmental law, including climate change law, is addressing human mobility and related protection needs.⁸³ Whereas the 1992 UN Framework Convention on Climate Change (UNFCCC) does not explicitly address the issue of migration, the preamble of the 2015 Paris Agreement does. This leads some scholars to conclude that environmental law is the most attractive and most likely route to be used to fill the legal protection gap.⁸⁴ Behrman and Kent argue that principles of the environmental regime are the most suitable for the design of a future framework, especially because of principles such as “common but differentiated responsibilities, responsibility not to cause transboundary environmental harm [...] and polluter pays.”⁸⁵ This will be further discussed later in this section, where it will become clear that the question of responsibility under international environmental law, especially in the context of climate change-related effects, remains a very controversial issue. There are ongoing debates as to whether responsibility towards the people induced to displacement by climate change can be based on the principles and rules of international environmental law.

3.2.1 Principles of environmental law

One of the fundamental rules of international customary law is that every state shall be held responsible for transboundary environmental harm. This principle is well established and was already expressed in 1941 in the conclusions of the *Trail Smelter* case:

no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁸⁶

⁸² See www.nanseninitiative.org/global-consultations, accessed July 1, 2021. In 2016, the state-led process that succeeded in the adoption of the Nansen Protection Agenda was carried forward by the Platform on Disaster Displacement (PDD).

⁸³ Un Doc. A/HRC/38/21, note 17, 8.

⁸⁴ See Behrman and Kent, note 40, 9–10.

⁸⁵ *Ibid.*

⁸⁶ *Trail Smelter Arbitration, United States v Canada* [1938–1941] III RIAA [1905] 33.

In environmental law this is reflected in the “no harm principle,” which is widely recognized and has been laid down in Principle 21 of the 1972 Stockholm Declaration and in Principle 2 of its successor, the 1992 Rio Declaration. Especially after the 1996 Advisory Opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons, there can be no doubt that these provisions reflect a rule of international customary law.⁸⁷ Both Declarations establish the sovereign right of states to exploit natural resources, and their respective responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond national jurisdiction.⁸⁸

When a rule of customary international law, such as the “no harm rule,” is breached, states can be held responsible for the damages. To bring forth such a responsibility it has to be established that there is: (a) a wrongful act attributable to a state; (b) a causal link between the activity and damage; (c) a violation of either international law or a violation of a duty of care, which is (d) owed to the damaged state.⁸⁹ Yet, in case of responsibility for climate change, particularly in case of responsibility towards people displaced by climate change, proving these elements is highly challenging. Even if the damaging activity causing climate change can be attributed to a particular state (as might be possible by identifying the top emitters of greenhouse gases (GHG)), the question of causation, as in the case with general causation between climate change and population movement, is likely to stay an insuperable obstacle. In this context, it is important to distinguish between general and specific causation. The first concerns the general link between the amount of anthropogenic emissions of greenhouse gases and climate change damages. This type of causation has universal scientific support and is confirmed by a number of IPCC reports.⁹⁰ Specific causation, however, requires cogent evidence that a particular activity has caused a specific type of damage.⁹¹ Legally speaking, it is problematic to establish that a certain state has caused damage to a particular individual or group of individuals by virtue of its greenhouse gas emissions.⁹² All states have to some extent contributed to climate change. To determine that the emission of the particular state has caused the concrete climate-related effect which results in population movement is likely to be impossible.

⁸⁷ Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 196.

⁸⁸ Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) UN Doc. A/CONF/48/14/Rev.1 (16 June 1972), Principle 21, Declaration of the United Nations Conference on the Human Environment (Rio Declaration) UN Doc. A/CONF/151/26/Rev.1 (1992), Principle 2.

⁸⁹ Richard SJ Tol and Roda Verheyen, “State Responsibility and Compensation for Climate Change Damages—A Legal and Economic Assessment” (2004) 32 *Energy Policy* 1111.

⁹⁰ For example IPCC, note 30.

⁹¹ Tol and Verheyen, note 89 at 1112.

⁹² Jane McAdam, “Environmental Migration Governance” (2009) 1 *UNSW Law Research Paper* 21.

Among other reasons that hamper the establishment of causation between a damaging activity and harm are the spatial and temporal factors. First, states that have caused the harm are more likely to be geographically remote from those who will suffer the consequences. Namely, according to some scientific projections, one of the effects of global warming may be the shift of the southern hemisphere cyclone belt to the south. If these prognoses come true the number of cyclones will increase enormously in Oceania, which will result in significant destruction and death. However, the causes of such grave effects will be geographically diffuse, as millions of people from different parts of the world have contributed to climate change. Moreover, people who are harmed will be remote in time from those who have harmed them. Certain Pacific islands, such as Kiribati and Tuvalu, may be wiped off the face of the Earth in the twenty-first century because of people's behavior during the nineteenth and twentieth centuries.⁹³

Therefore, it seems that the problem of causation presents an insuperable obstacle in establishing the responsibility under the "no harm rule" and does not allow for application of this legal principle in cases with EDPs.

Another principle of international customary law, which might be relevant for the protection of those displaced due to climate change, is the "polluter pays principle." This principle provides that

national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interests and, without distorting international trade and investment.⁹⁴

This principle has great relevance for CDPs. Developed countries have contributed the most to global warming. However, as discussed above, due to their geographical location and their poor adaptation capacity, developing countries are going to suffer the most from its consequences. The fact that developing countries are not to blame for climate change and usually have a limited capacity to deal with the problem makes financial assistance from those who have caused the problem a logical and fair obligation. In fact, in 2010, at the Conference on Climate Change in Cancun (COP16), it was decided to establish a Green Climate Fund, as an operating entity of the financial mechanism of the UNFCCC.⁹⁵ The main objective of the Fund is to promote the achievement of the UNFCCC's goals. This contribution is planned to be done through "providing support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change, taking

⁹³ Stephen M Gardiner et al., *Climate Ethics: Essential Readings* (Oxford University Press 2010) 84.

⁹⁴ Declaration of the United Nations Conference on the Human Environment (Rio Declaration) UN Doc. A/CONF/151/26/Rev.1 (1992) Principle 16.

⁹⁵ Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1, para. 102.

into account the needs of those developing countries particularly vulnerable to the adverse effects of climate change.”⁹⁶

Nevertheless, the “polluter pays principle” has not received a lot of support or attention among states and in case law. Its legal content remains unclear and it is very doubtful that this principle has achieved the status of a generally applicable rule of customary international law, except perhaps in relation to states in the European Union, the United Nations Economic Commission for Europe (UNECE), and the Organisation for Economic Co-operation and Development (OECD).⁹⁷

Overall, it can be concluded that principles of international environmental law do not provide a sufficient ground for dealing with people induced to displacement by climate change. Even though the “no harm rule” and “polluter pays principle” *prima facie* seem to be relevant, in practice their application is hampered. With regard to the first rule, the issue of causation poses an obstacle to establishing responsibility, whereas the legal status of the “polluter pays principle” raises a lot of doubt. There is no case law on this issue yet. Furthermore, as has been already emphasized, pre-emptive actions are crucial in case of climate-induced displacement, as they help to avoid uncontrolled migration flights, conflicts, and other instabilities. Yet, principles of international environmental law do not promote mitigation and adaptation to climate change, which are crucial for people induced to relocate, as they can help to avoid displacement.

The UNFCCC, the Kyoto Protocol, and the Paris Agreement Treaties in international environmental law are more concrete than the above-discussed principles and play a more significant role. The UNFCCC, the Kyoto Protocol,⁹⁸ and the Paris Agreement⁹⁹ lay down rules that are better defined and provide for more differentiated obligations regarding implementation, control, and enforcement of environmental rules and standards.¹⁰⁰

The UNFCCC, which entered into force in 1994, is the prime international instrument that deals with the issue of climate change. The main goal of the Convention, as stated in Article 2, is

stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate

⁹⁶ Green Climate Fund Report of the Transitional Committee, Draft decision-/CP.17, Annex, Objectives and guiding principles.

⁹⁷ Sands and Peel, above note 87, 229.

⁹⁸ United Nations Framework Convention on Climate Change (New York, 9 May 1992), (1992) 31 ILM 849, entered into force 21 March 1994, and Kyoto Protocol to the United Nations Framework on Climate Change, UN Doc FCCC/CP/1997/7/Add. 1 (Kyoto, 10 December 1997), (1998) 37 ILM 22, entered into force February 16, 2005.

⁹⁹ United Nations Framework Convention on Climate Change (Paris, 12 December 2015) Adoption of the Paris Agreement, 21st Conference of the Parties, U.N. Doc. FCCC/CP/2015/L.9/Rev/1, entered into force November 4, 2016.

¹⁰⁰ Tol and Verheyen, note 89, 1114.

change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

Among the UNFCCC principles which can be relevant to climate-induced displacement is the requirement for the developed States Parties to take a lead in the protection of the climate system for the benefit of present and future generations, on the basis of equity and in accordance with common but differentiated responsibilities and respective capabilities.¹⁰¹ Another essential provision of the UNFCCC is that the specific needs of developing States Parties, especially those that are particularly vulnerable to the adverse effects of climate change and those that would have to bear a disproportionate burden under the UNFCCC, should be given full consideration.¹⁰² Furthermore, the Parties are required to take precautionary measures to prevent or minimize the causes of climate change and mitigate its adverse effects. This principle also lays down that the “lack of full scientific certainty should not be used as a reason for postponing precautionary measures” where there are threats of serious or irreversible damage.¹⁰³

With regard to climate change mitigation and adaptation, the Kyoto Protocol and the UNFCCC contain a number of more specific provisions which potentially can be relevant for people induced to displacement by climate change. First of all, Article 4(1)(b) UNFCCC obliges all Parties to “formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change [...] and measures to facilitate adequate adaptation to climate change.”¹⁰⁴

This provision makes clear that adaptation is not a provisional obligation, but rather a binding rule for the Parties. Further, the UNFCCC requires all the developed countries (so-called Annex II countries) to assist the developing countries in meeting the costs of adaptation to the effects of climate change.¹⁰⁵ Third, the Kyoto Protocol establishes the Adaptation Fund that aims to finance concrete adaptation projects and programs in developing countries which are parties to the Kyoto Protocol, and which are particularly vulnerable to the adverse effects of climate change. The Fund is financed from the revenues from operation of the Clean Development Mechanism and other sources of funding.¹⁰⁶

However, if we analyze the wording of the UNFCCC, it becomes clear that it only foresees partial funding of adaptation measures by Annex II countries. The way in which Article 4(4) is formulated, using the term “assist,” makes clear that there is no straight obligation for Annex II countries to bear the full costs of adaptation

¹⁰¹ Article 3(1).

¹⁰² Article 3(2).

¹⁰³ Article 3(3).

¹⁰⁴ Article 4(1)(b).

¹⁰⁵ Articles 4(3), 4(4).

¹⁰⁶ See extensively Chapter 2.

in all developing countries.¹⁰⁷ With regard to the responsibility for breaching the obligations of the UNFCCC and the Kyoto Protocol, there are also no clear grounds for bringing such a claim. Article 2 of the UNFCCC only establishes the objective of preventing any damage to the climate system; it does not prohibit GHG emissions as such. As for the Kyoto Protocol, it also does not tackle the issue of damage, even though it sets legally binding targets. The Protocol presents in Article 2 the list of requirements which Parties are obliged to meet in order to reach reduction targets. However, how to implement the policies remains largely at the states' discretion, and can be implemented in accordance with national circumstances. Therefore, while the European Union chose more fixed and mandatory regulations, other states, such as Canada, Australia, and some other Annex I Parties, have left themselves some space for deviation.¹⁰⁸ The policies and measures prescribed in Article 2 cannot be considered as being mandatory and, thus, establishing respective responsibility does not seem feasible.

Implicitly, the issue of climate-induced migration was first mentioned in the UNFCCC assembly text in December 2008.¹⁰⁹ Heated discussions and a lot of research on the issue were reflected in the Cancun Agreement—the outcome of the 2010 Conference on Climate Change in Cancun (COP16). The Agreement declared that adaptation strategies should address vulnerable communities, specifically identifying migrants.¹¹⁰

Five years later a significant step was taken at COP21, where in the preamble of the agreement concluded—the Paris Agreement—explicit reference is made to the need for states to protect the rights of migrants in the context of climate change impacts. The Paris Agreement however does not address the legal status of refugees or mandate their protection and assistance. It does set up a taskforce to

complement, draw on the work of and involve, as appropriate, existing bodies and expert groups under the Convention including the Adaption Committee and the Least Developed Countries Expert Group, as well as relevant organizations and expert bodies outside the Convention, to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.¹¹¹

Similarly, the Global Compact for Safe, Orderly, and Regular Migration (adopted by 164 countries—not including the US—in Marrakech in December 2018) called on

¹⁰⁷ Tol and Verheyen, note 89, 1115.

¹⁰⁸ Benjamin J Richardson, "Kyoto Protocol to the United Nations Framework Convention on Climate Change" (1998) 2 *New Zealand Journal of Environmental Law* 253.

¹⁰⁹ Division of International Protection, *Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiation* (UNHCR Legal and Protection Policy Research Series 2011) 4.

¹¹⁰ Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1.

¹¹¹ Report of the Conference of the Parties on its 21st session, held in Paris from 30 November to 13 December 2015, Decision 1/CP.21 at para. 49.

countries to make plans to prevent the need for climate-caused relocation and support those forced to relocate.¹¹²

Even though the issue of climate-induced displacement was introduced to the UNFCCC agenda, there is still no positive answer to the question whether the UNFCCC can be used for effective protection of people at risk of climate-induced displacement, or as a basis for claiming certain states to be responsible for such protection. This is despite the shown fact that the UNFCCC recognizes the specific needs of developing countries, and that the principle of “common but differentiated responsibilities and respective capabilities,” which requires developed States Parties to “take the lead in combating climate change and the adverse effects thereof,” is a continuing theme throughout the UNFCCC.¹¹³ When it comes to actual responsibility for damaging activities, and especially responsibility towards CDPs, it appears too difficult to identify specific state obligations under the UNFCCC. The main reason for that lies in the fact that the UNFCCC sets up mainly common goals, shared principles, and general interests of the international community and leaves states a lot of room for maneuver. It does not explicitly provide for specific state obligations and does not resolve the issue of state responsibility either for adaptation or for damages. With the adoption of the Paris Agreement the issue of climate-induced displacement has gained more explicit recognition, but provisions concerning specific assistance or protection for those who will be directly affected by the effects of climate change are not included.

Ultimately, it can be concluded that at the current stage environmental law has too many limitations to be considered an effective legal framework for addressing the issue of climate-induced displacement and does not offer sufficient protection to CDPs. Furthermore, neither international customary law nor the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement contain any specific provisions on climate-induced displacement and responsibilities towards its victims. Even though the 2010 COP16 and the 2015 COP21 made positive contributions toward the recognition of the issue by the international community, in order to make an actual improvement further modifications of the environmental legal regime are required.

¹¹² See specifically, Articles 18.H (share information to better map and predict migration based on climate change and environmental degradation), 18.I (develop adaptation and resilience strategies that prioritize the country of origin), 18.J (factor in human displacement in disaster preparedness strategies), and 18.K (support climate-displaced persons at the sub-regional and regional levels). United Nations. Global Compact for Safe, Orderly and Regular Migration: Intergovernmentally Negotiated and Agreed Outcomes, July 13, 2018. https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf, accessed July 8, 2021.

¹¹³ Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1. See Article 3(1).

3.3 Human Rights Law

The previous sections on refugee law and environmental law show how these international regimes fall short in protecting those displaced by climate change. The last relevant regime discussed here is international human rights law. This legal regime is important in light of the fact that people on the move due to climate change suffer an infringement of their basic human rights. All persons hold human rights and all states in the world have ratified at least one human rights treaty.¹¹⁴ The question therefore arises as to the extent to which the regime of international human rights law offers protection to CDPs. As mentioned *supra*, it has been argued that “international human rights law, norms and standards offer the most comprehensive, people-centred and flexible framework for the protection of all migrants in vulnerable situations, including those affected by climate change.”¹¹⁵ Arguably, “human rights obligations, standards and principles have the potential to inform and strengthen international, regional and national policymaking in the area of climate change.”¹¹⁶ The view of the HRC in the *Teitiota* case mentioned in the introduction to this chapter seems to confirm the idea that human rights law may hold promise as an avenue of protection to people on the move because of effects of climate change. In principle, human rights protection applies to all, irrespective of whether one is displaced or not. Human rights law obligates states to safeguard the human rights, such as the rights to life and property, of those within a state’s jurisdiction against threats of disaster and foreseeable harm.

Hence, in this section we turn to discuss whether general human rights law¹¹⁷ provides an adequate legal framework to address the problems arising from climate-induced displacement. Before turning to the human rights obligations of states relevant to the problems faced by persons dislocated internally or beyond borders, it is useful to distinguish the effects of rapid- and slow-onset climate change from the perspective of human rights law. The conditions facing those relocating due to slow-onset climate change such as droughts are significantly different to those forced to flee following a rapid disaster such as a tsunami. Overall, the latter category finds better protection under international law than those dislocated due to slow-onset climate change, as the displacees might meet the refugee definition or might be given a temporary protected status in certain countries.¹¹⁸ Those forced to

¹¹⁴ In total, more than 130 states around the world have ratified more than ten human rights treaties. See: <https://indicators.ohchr.org/>, accessed July 8, 2021.

¹¹⁵ A/HRC/38/21, note 17, para. 37.

¹¹⁶ *Ibid.*

¹¹⁷ This section is limited to international human rights law. International humanitarian law (IHL) may also be a relevant section of international law given the presupposed links between environmental factors and violent conflict. Due to space constraints, IHL is not discussed in this chapter.

¹¹⁸ Nevertheless, the current TPS designations remain highly discretionary and too narrow to apply to most cases of climate-induced migration. See GMF, *Climate Change and Migration* (The German Marshall Fund of the United States 2010) 6, 8.

relocate due to slow-onset climate change, however, do not qualify for these narrow exceptions and need to fall back on human rights law in general.

3.3.1 Human rights law and climate-induced displacement

Climate change in general will clearly entail a multitude of negative effects on the realization of internationally recognized human rights. As the Human Rights Council mentions in its resolution on human rights and climate change, adverse effects will affect the rights to life, food, health, housing, self-determination, water and sanitation, and development.¹¹⁹ Moreover, those individuals and groups that are already in a precarious position, such as women, children, and indigenous peoples living primarily in poorer regions and countries, are most likely to experience these negative effects.¹²⁰ As mentioned *supra*, the IPCC first noted in 1990 that the greatest single impact of climate change will be on human migration. Climate-induced relocation may affect a broad range of human rights, but certain human rights such as the right to housing, the right to property, and land rights will specifically be affected.

The UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has pointed out that “States have obligations to protect the enjoyment of human rights from environmental harm. These obligations encompass climate change. The foreseeable adverse effects of climate change on the enjoyment of human rights give rise to duties of States to take actions to protect against those effects.”¹²¹

Yet that does not automatically imply that climate change as such can be labeled as a human rights violation.¹²² As put forward by the Office of the High Commissioner for Human Rights (OHCHR), from a strict legal perspective, labeling the effects of climate change as human rights violations for which states can be held accountable is problematic for several reasons.¹²³

First, there is the above-mentioned problem of causality. In practice, it will prove difficult for an individual that cannot fully enjoy his or her human rights to prove a causal link with climate change, especially in the case of slow-onset climate change. The human rights challenges posed by such climate change are subtle and it is problematic to pinpoint a directly responsible state. However, as pointed out by Knox, it is possible to locate the largest emitters of greenhouse gases and therefore,

¹¹⁹ UN Doc. A/HRC/Res/35/20, 7 July 2017.

¹²⁰ *Ibid.*

¹²¹ UN Doc. A/HRC/31/52, 1 February 2016, para. 33.

¹²² Nevertheless, in 2005 the Inuit filed a claim with the Inter American Commission on Human Rights directed against the US for their high emissions of greenhouse gases and the ensuing violations of the human rights of the Inuit. The Inter American Commission decided not to deal with the Inuit petition, stating that the information provided did not make it possible to determine whether the alleged facts would tend to characterize a human rights violation. For more on this case see Randall S Abate, “Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights” (2007) 43A(1) *Stanford Journal of International Law* 3.

¹²³ UN Doc. A/HRC/10/61, para. 70.

at least in principle, it would be possible to establish that some states are far more culpable than others.¹²⁴ Nevertheless, allocation of responsibility remains a difficult issue. An additional problem regarding climate-induced displacement is, as discussed previously, the fact that global warming is often only just one cause of relocation. Third, procedures to claim compensation and reparation under international human rights law are open to those that have suffered such a violation—in other words, after the fact—whereas in the case of climate change the effects often concern projections of future harm.¹²⁵

For these reasons it will prove difficult to hold a state responsible under international human rights law for the effects of climate change, such as displacement. However, as also noted in the report by the OHCHR, “irrespective of whether or not climate change effects can be construed as human rights violations, human rights obligations provide important protection to the individuals whose rights are affected by climate change or by measures taken to respond to climate change.”¹²⁶ Under international human rights law, states have the obligation to protect individuals against harm that affects the enjoyment of their human rights even if they are not directly responsible for those threats. The obligation of states to protect individuals against threats to the enjoyment of human rights even though the state is not causing the threat is firmly grounded in international human rights law. This implies that states have to take certain measures to protect citizens against foreseeable risks connected to climate change that may amount to human rights violations.¹²⁷ For example, states have the obligation to provide emergency relief policies and to guarantee access to information and participation in decision-making regarding environmental risks. A failure on the part of a state to implement such measures will amount to a breach of its human rights obligations.¹²⁸ This is an important basis for applying international human rights law to the effects of climate change, leaving aside the problematic debate on causality.

¹²⁴ John H Knox, “Linking Human Rights and Climate Change at the United Nations” (2009) 33 *Harvard Environmental Law Review* 477, 489.

¹²⁵ UN Doc. A/HRC/10/61/, para. 70.

¹²⁶ *Ibid.* para. 71.

¹²⁷ *Ibid.* para. 74.

¹²⁸ The supervisory human rights bodies have addressed such issues on numerous occasions. For a review of relevant jurisprudence see K Anton and D Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011). To mention but one example, in the case of *Budayeva and Others v Russia*, the European Court of Human Rights held that a failure to implement land/planning and emergency relief policies while the authorities were aware of an increasing risk of a large-scale mudslide amounted to a violation of the right to life as provided in Article 2 of the European Convention on Human Rights (ECHR). Moreover, the state failed in providing sufficient information on the risk to the community (European Court of Human Rights, No. 15339–02).

3.3.2 Protection for people displaced within a state

The normative framework for those dislocated within a state is better developed than for those that flee their country due to climate change. The 1998 Guiding Principles on Internal Displacement protect displaced persons against arbitrary or forced displacement and rights related to housing and property restitution.¹²⁹ The definition of a displaced group in the Guiding Principles is of a descriptive nature and non-exhaustive. According to the Guidelines, internally displaced persons are

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized border.

In the case of forced relocation, the displaced will qualify as a vulnerable group with a right to increased assistance and protection. Nevertheless, the effects of climate change might cause relocation that does not fit in the broad definition of IDPs, for example when people move pre-emptively. In other words, the Guiding Principles fall short of offering protection to persons forced to relocate following slow-onset climate change unless the reasons for their relocation (drought etc.) are considered as disasters. Moreover, the Guiding Principles are also considered weak due to their non-binding nature.

If the Guiding Principles do not apply or fall short of offering adequate protection, general human rights law protects the internally displaced. International human rights law explicitly recognizes certain groups, such as women, children or indigenous peoples, as vulnerable groups. However, this is not the case with those displaced by climate change. Nevertheless, states have the obligation to respect, protect and fulfil the human rights of *all* people within their jurisdiction.¹³⁰ This means that persons affected by climate-induced displacement within the borders of a country are entitled to the full range of human rights guarantees that the state is obligated to provide in line with the human rights treaties it has succeeded to.¹³¹ People that suffer human rights violations due to climate-induced dislocation within national borders will thus have to turn to that given state. However, these countries usually are developing countries, and access to justice in these states will often prove problematic. Even more problematic is justifiability where it concerns economic, social and cultural

¹²⁹ UN Doc. E/CN.4/1998/53/Add.2, Annex, Principle 1, para. 1 and Principle 6, para. 1.

¹³⁰ See, for example, Article 2 International Covenant on Civil and Political Rights (ICCPR), Article 1 of the ECHR and Human Rights Committee, “General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (21 April 2004).

¹³¹ See the Guiding Principles on Internal Displacement (UN Doc.E/CN.4/ 1998/53/Add.2, Annex 1), Principles 1, para. 1 and 6, para. 1.

(ESC) rights, a category of rights notably affected by climate-induced displacement. In many jurisdictions, ESC rights cannot be invoked before a court of law.¹³²

3.3.3 Protection for climate-induced displaces across borders

If a person flees across a national border due to environmental factors, this person will be entitled to general human rights guarantees in a receiving state in line with the human rights obligations of that state.¹³³ A particularly relevant treaty in this respect is the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families. However, as mentioned previously, climate displacement notably affects poorly developed regions of the world. In practice, therefore, the reliance on the receiving state to guarantee the human rights of CDPs often will prove illusory.

It is therefore essential also to examine whether under international human rights law states have extraterritorial obligations that might offer protection to people that have been displaced due to climate change. The human rights obligations of states under most human rights treaties are limited to those that are within their jurisdiction.¹³⁴ ICESCR, however, does not have such a restricting jurisdictional clause. Article 2(1) provides:

Each State Party to the present Covenant undertakes to take steps, individually and through *international assistance and co-operation* [emphasis added], especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Consequently, ESC rights are generally considered to have an extraterritorial component. The obligation for states to respect and protect these rights is not restricted to a given state's jurisdiction.¹³⁵

Moreover, Article 2(1) ICESCR explicitly refers to international cooperation in order to realize the rights in the Covenant.¹³⁶ According to Article 2(1) of the

¹³² However, at the international level an optional protocol containing an individual right to complain about violations of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) has entered into force improving the justifiability of ESC rights. At the time of writing, 26 states had ratified this optional protocol.

¹³³ Certain human rights provisions may prohibit a state from returning the environmentally displaced, as was concluded in the *Teitiota* case by the HRC and discussed *infra* in the section on non-refoulement/complementary protection.

¹³⁴ See, for example, Article 2(1) ICCPR, which states that “each party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant.”

¹³⁵ For more on the extraterritorial dimension of human rights see the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights; and Michal Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009).

¹³⁶ See also Articles 11(1), 15(4), 22 and 23 ICESCR.

ICESCR, States are obliged to undertake joint and separate action to achieve the full realization of the rights in the Covenant.¹³⁷ Developed states have a particular responsibility and interest to assist the poorer developing states.¹³⁸ This is important as climate-induced relocation will mostly affect poorer parts of the world. As pointed out by Special Rapporteur Knox, addressing the issue of climate change and human rights from the perspective of the extraterritorial obligations of each and every single state is not very useful nor feasible. Rather, Knox points out that

from the creation of the Intergovernmental Panel on Climate Change in 1988, through the adoption of the United Nations Framework Convention on Climate Change in 1992, to the negotiation of the Paris Agreement in 2015, States have consistently treated climate change as a global problem that requires a global response. This approach not only makes the most practical sense. It is also in accord with, and can be seen as an application of, the duty of international cooperation.¹³⁹

The Committee supervising the ICESCR has held that this obligation entails, *inter alia*, the obligation to “take steps through international cooperation and assistance, depending on the availability of resources, to facilitate the fulfillment of human rights in other countries, *including disaster relief, emergency assistance, and assistance to refugees and displaced persons.*”¹⁴⁰ The ICESCR is particularly relevant for those that are displaced due to climate change as this will frequently imply a violation of ESC rights such as the right to housing, the right to an adequate standard of living, or the right to health. Furthermore, the ICESCR requires that states pay special attention to those that fall victim to natural disasters and people living in disaster-prone areas.¹⁴¹ The duty of international cooperation can also be found in other international human rights instruments such as the Convention on the Rights of the Child,¹⁴² the Convention on the Rights of People with Disabilities,¹⁴³ and the Declaration on Development.¹⁴⁴ As brought forward by the OHCHR, this complements the principle of “common but differentiated responsibilities” laid down in the UNFCCC.¹⁴⁵

This obligation of international cooperation is crucial in the light of climate-induced displacement. It is clear that climate change as a cause of displacement can only be addressed by means of international cooperation. Thus states are obliged not only to implement treaties within their jurisdictions but also to contribute, through inter-

¹³⁷ See, *inter alia*, General Comment No. 19 (2008).

¹³⁸ General Comment No. 3 (1990).

¹³⁹ UN Doc. A/HRC/31/52, para. 42.

¹⁴⁰ Emphasis added. See, e.g., General Comment No. 12 (1999) on the right to adequate food (Article 11); No. 13 (1999) on the right to education (Article 13); No. 14 (2000) on the right to the highest attainable standard of health (Article 12); and No. 15 (2002) on the right to water (Articles 11 and 12 of the Covenant).

¹⁴¹ General Comment No. 12, para. 13.

¹⁴² Articles 4 and 24(4).

¹⁴³ Article 32

¹⁴⁴ Articles 3, 4, and 6.

¹⁴⁵ UN Doc.A/HRC/10/61, para. 87.

national cooperation, to global implementation. Knox argues that the human rights obligation to cooperate “requires the international community to establish a global polity for the purpose of addressing climate change.”¹⁴⁶ In light of the topic at hand it can be argued that the international human rights duty to cooperate obligates states to draw up a global instrument addressing climate-induced displacement.

Notwithstanding the importance of the obligations of international cooperation, enforcing the international obligations that states have according to the international human rights treaties remains problematic.

3.3.4 *Non-refoulement/complementary protection*

As discussed previously, climate change does not provide people relocating to other countries with a right of entry based on the prime international document, the 1951 Refugee Convention. Nevertheless, those that are forcibly displaced from their homes to another state might find protection from other obligations under international human rights law that the receiving states might be party to. This is known as “complementary protection,” because it complements the Refugee Convention.¹⁴⁷

Complementary protection follows from the principle of *non-refoulement*, which implies that asylum seekers already present within a jurisdiction cannot be removed by that state to a country where the person will face a real risk of persecution or exposure to torture, inhuman treatment, or other serious human rights violations. The principle of *non-refoulement* has been enshrined in several human rights provisions, such as the prohibition of torture and other inhuman or degrading treatment (Article 3 ECHR, Article 7 ICCPR, and Article 3(1) Convention Against Torture (CAT)). Overall, it has been concluded that the level of complementary protection is lower than that provided for in the Refugee Convention.¹⁴⁸ Nevertheless, EDPs may find some protection from the obligations of receiving states that follow from the human rights provisions on *non-refoulement*. This was the conclusion of the HRC in the *Teitiota* case, where it was held that returning the claimant to the island of Kiribati could amount to a violation of his right to life. In its view the HRC builds on its earlier acknowledgement in 2018 that environmental degradation can be brought within the scope of a violation of the right to life under Article 6 of the ICCPR.¹⁴⁹ Notwithstanding the importance of the case before the HRC, it must be noted that in this specific case the claim for protection failed. The HRC considered the danger faced by the claimant was not specific enough to him and his family, as the threat

¹⁴⁶ Knox, above note 124, 495–6.

¹⁴⁷ For a detailed study on complementary protection see Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007).

¹⁴⁸ Jane McAdam, “The European Qualification Directive, The Creation of a Subsidiary Protection Regime” (2005) 17 *International Journal of Refugee Law* 461.

¹⁴⁹ HRC, “General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life” UN Doc CCPR/C/GC/36 (30 October 2018) para 62.

was the same as that faced by all other inhabitants of Kiribati.¹⁵⁰ The obligation to refrain from deportation arises only when the risk is personal to the claimant. Claims that are based on general conditions will be accepted only in “the most extreme cases, and [where] there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.”¹⁵¹ The acknowledgement by the HRC that returning a person to a situation where climate change threatens life may constitute a human rights violation is a significant step toward patching together a regime of protection for CDPs. However, the need to prove a greater individual threat rather than a general threat in each case may prove extremely difficult. Another argument for why the HRC did not acknowledge the claim for protection in this case is that the timescale for the islands of Kiribati to become uninhabitable was 10–15 years: too far into the future to claim protection, according to the HRC. This argument has encountered critique given the mounting scientific evidence that the threat to life is very real.¹⁵² Nevertheless, the acknowledgment by the HRC that such cases based on general conditions will be accepted only in “the most extreme cases” does open a window of opportunity given the rapidly unfolding gravity of climate-induced displacement. Other human rights bodies, such as the European Court of Human Rights, have not yet ruled in such a case, but it is conceivable that these bodies would follow the same line of reasoning as the HRC. “Degrading treatment” may entail the denial of sufficient basic services necessary for a dignified existence. It is conceivable that a CDP would be confronted with such circumstances when returned. The receiving state returning such a person would then be in violation of its obligations under, for example, Article 3 ECHR, and the displaced person could subsequently bring such a case to the attention of the supervisory body, the European Court of Human Rights.¹⁵³ However, it has been argued that the chances of this complementary protection mechanism based on Article 3 ECHR becoming a meaningful protection mechanism are slim. McAdam argues that only under the most exceptional circumstances will a lack of resources be found to be a reason prohibiting forced return.¹⁵⁴

3.3.5 The responsibility to protect and climate-induced displacement

From the above it becomes clear that dependency on a single state to address climate-induced migration is problematic in the face of this global phenomenon. A concept has been developed that rises above the single-state approach and which might prove beneficial to addressing the problems created by climate-induced migra-

¹⁵⁰ HRC, *Ioane Teitiota v New Zealand*, note 3 para 9.3.

¹⁵¹ *Ibid* paras 9.6, 9.7.

¹⁵² Simon Behrman and Avidan Kent, “Human Rights Committee’s Decision On the Case *Ioane Teitiota v New Zealand*: Landmark or Will-O’-the-Wisp for Climate Refugees? The Teitiota Case and the Limitations of the Human Rights framework,” *QIL*, Zoom-in 75 (2020) 25–39.

¹⁵³ Margit Ammer, *Climate Change and Human Rights. The Status of Climate Refugees in Europe* (Boltzmann Institute 2009) 59.

¹⁵⁴ Jane McAdam, “The European Qualification Directive, The Creation of a Subsidiary Protection Regime” (2005) 17 *International Journal of Refugee Law* 461.

tion. There is widespread recognition that large-scale deprivation of basic human rights cannot be considered to belong to the domestic jurisdiction of a state. From this idea of “responsible sovereignty,”¹⁵⁵ the concept of the “Responsibility to Protect” (R2P) has developed. It has been argued that it might offer an avenue for creating obligations for states *vis-à-vis* people that are displaced due to climate change.¹⁵⁶ R2P, first developed by the International Commission on Intervention and State Sovereignty (ICISS), focuses on every state’s protection of its own population from certain threats.¹⁵⁷ If a state fails in living up to this responsibility to protect its population, the international community, especially through the UN Security Council, must bear the responsibility. It may be argued that climate change will lead to mass migration, threatening regional and international stability. Based on this the UN Security Council would have the responsibility to use its Chapter VII powers to intervene. However, military intervention must be seen as a measure of last resort. R2P imposes a range of positive duties upon states to take steps to prevent victimization and statelessness and generally to address the grave circumstances of those living without any protection of their human rights.¹⁵⁸ Initially, the R2P concept explicitly mentioned disasters of a large magnitude as falling within the scope of R2P.¹⁵⁹ However, in 2005 the United Nations General Assembly¹⁶⁰ and, a year later, the Security Council¹⁶¹ adopted a much narrower reading of R2P limiting the concept to cases in which a population is in need of protection from acts of genocide, ethnic cleansing, war crimes, and crimes against humanity. Since then, it has mostly been denied that R2P applies to environmental crises.¹⁶² However, calls have been made to widen the R2P concept to include the threat of climate change.¹⁶³ This section has shown that inter-

¹⁵⁵ The then Secretary-General’s Special Representative for Internally Displaced Persons, Francis Deng, is thought to have been the first to coin the phrase “responsible sovereignty.” Francis M Deng, “Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced” (1995) 8(2) *Leiden Journal of International Law* 249–86.

¹⁵⁶ Ammer, above note 153, 64.

¹⁵⁷ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (ICISS 2001). R2P developed from the efforts to design an international system to protect IDPs. See Roberta Cohen, *Reconciling R2P with IDP Protection* (Global Responsibility to Protect 2010) 15–37.

¹⁵⁸ B Barbour and B Gorlick, “Embracing the Responsibility to Protect. A Repertoire of Measures Including Asylum for Potential Victims” (2008) 20(4) *International Journal of Refugee Law* 465.

¹⁵⁹ ICISS, note 157, 33.

¹⁶⁰ UN Summit Outcome Document 2005, UN Doc. A/Res/60/1.

¹⁶¹ UNSC Resolution 1674 (2006) S/RES/1674 (2006) 28.04.2006, para. 4.

¹⁶² See, for example, the speech by the UN Secretary General in 2008 warning that the concept of R2P should not be stretched beyond the 2005 consensus. Ban Ki-Moon, Address of the UN Secretary General at event on Responsible Sovereignty, International Cooperation for a Changed World, July 15, 2008.

¹⁶³ Stefanie Fishel, “Is Climate Change a Threat Multiplier? R2P and Environmental Disasters,” April 24, 2018, www.e-ir.info/2018/04/24/is-climate-change-a-threat-multiplier-r2p-and-environmental-disasters/, accessed July 8, 2021.

national human rights law does offer some potential protection to people displaced as a result of climate change. Some scholars have critiqued the regime of international human rights law (IHRL) as a suitable avenue to offer protection to CPDs. Behrman and Kent find the human rights regime lacking especially in establishing claims for assistance and the right to enter host states in the first place. They argue that the individualized approach of human rights law makes it ill-equipped to address the complexity of climate change.

The reliance on a single state to ensure that CDPs can enjoy their human rights is problematic. But the international human rights framework does contain some extraterritorial obligations that are relevant for the protection of CDPs. The duty of international cooperation, as has been laid down in several international human rights instruments, provides a potentially important foundation upon which to build an international framework addressing the effects of climate-induced displacements. However, many legal gaps in protection remain, especially where it concerns cross-border displacement following slow-onset climate change.

4. CONCLUSIONS AND OUTLOOK

Climate change and climate change-related events have a horrific impact not only on the environment but also on human inhabitants. The number of natural catastrophes increases as swiftly as the number of people who have to relocate because of them. Should the existing prognoses come to pass, we can expect between 50 and 350 million climate migrants by 2050. In the current chapter, the state of existing international law with regard to the issue of climate-induced displacement was explored and limitations and opportunities in providing legal protection to this group of people were examined. The analysis undertaken allows us to draw the following conclusions.

First, as has been shown, the nature of the relationship between climate change and population movement is considered to be highly controversial. This results in numerous associated problems, such as the difficulty in conceptualizing people displaced by climate change and granting them a legal status. Nevertheless, the numerous prognoses made by the top scientific bodies and the UN agencies, and the analysis of the concrete impacts of climate change on certain regions, show that there is enough evidence that some areas will become completely unsuitable for living in as a result of changing climate. This will leave people no choice other than to relocate. Directly or indirectly, climate change will spur large-scale population displacement, threatening regional and global stability. Therefore, it has been argued that instead of getting bogged down in theoretical disputes, policy-makers, politicians, and scholars should make the search for ways to provide a timely response to the issue and protect CDPs their priority.

In that light the current chapter has presented an overview of existing international legal frameworks which potentially can be applied to the issue of climate-induced displacement.

The first regime that has been considered is international refugee law, as this is the main instrument at the international level that focuses on the protection of displaced populations. Yet, as has been shown, the attempt to apply refugee law to people induced to displacement by climate change is problematic. The central obstacle is that the definition of “refugee” under the Refugee Convention does not extend to include people displaced by climate change. There are suggestions that this can be overcome by extending the conventional definition. Nevertheless, this proposed solution seems to overlook some important points. One of them is that the amendment of the Refugee Convention will undermine the protection of political refugees. The UNHCR, which is the main institution with the mandate to assist and protect refugees, is already overloaded with work and lacks the financial resources and capacity to assist those people for whom the Refugee Convention was initially created. Should people displaced by climate change be granted refugee status, the entire refugee regime may collapse. Moreover, it should be kept in mind that some of the countries most severely affected by the issue of climate-induced displacement, such as India and Bangladesh, are not parties to the Refugee Convention. It is very doubtful that they will have any incentives to join the Convention in future. The underlying rule of the Refugee Convention is that the first host country has to accept refugees. For India, the ratification of the Refugee Convention will mean the acceptance of unbearable obligations toward the flow of refugees from Bangladesh. Clearly, it is very unlikely that potential host states will be in favor of the extension of the Refugee Convention.

The second legal framework investigated in this chapter is international environmental law. This is a potentially relevant framework as it lays down the responsibility of states for environmental damage and deals specifically with the issue of mitigation and adaptation to climate change. Despite seemingly growing acknowledgement of the issue of climate-induced displacement within this framework, the potential seems rather limited. The current analysis has shown that neither customary international law nor the provisions of the UNFCCC, the Kyoto Protocol, or the Paris Agreement contain any concrete rules that can help protect people displaced by climate change. At the same time, the research has revealed certain positive features and initiatives toward recognition of the issue of climate-induced displacement within the international environmental legal framework. Therefore, some scholars argue that the problem can be tackled through the amendment of the UNFCCC with a separate protocol, which will focus specifically on the issue of climate-induced displacement. Supporters of this solution set out several reasons to justify its efficiency. First of all, the UNFCCC has a vast membership, and a lot of developing countries affected by climate change, such as Bangladesh, Tuvalu, Kiribati, and many of the affected African states, are currently among its Parties. The second important advantage arises from the fact that the principle of common but differentiated responsibilities is currently embedded into the UNFCCC, making it attractive for the states threatened by climate change to be supportive of such a protocol. Furthermore, the institutional regime under the UNFCCC is already established and functioning, and there is even

an international arena, the Conference of the Parties, where this proposal can be introduced and discussed.

Third, the chapter considered international human rights law. This is a potentially interesting framework in light of the problems caused by the issue of causality. Under international human rights law, states have the obligation to protect individuals against harm that affects the enjoyment of their human rights even if the state in question is not directly responsible for those threats. Human rights law thus provides a way to bypass the causality issue, which proves to be a significant stumbling block to including CDPs in international legal frameworks offering protection. The case before the HRC of Mr Teitiota, who had to flee the submerging island in Kiribati, is a first, small—but important—step toward the acknowledgement that states have an obligation not to return people to a country where they face grave danger as a result of climate change. Yet, notwithstanding the importance of this step, in this particular case the claim for protection failed to make clear that effective protection for CDPs is still lacking under the human rights framework too. On paper, CDPs enjoy all the human rights protection that the state they are in is obliged to ensure in accordance with the international human rights treaties to which it has signed up. In practice, however, this protection will often prove hard to invoke. Furthermore, the individualized approach in the human rights framework might not seem suitable to address the global complexities of climate-induced displacement. However, the importance of the human rights framework for the protection of CDPs lies in the extraterritorial obligations that can be detected, such as the international obligation to cooperate and provide assistance. This can be seen as a building block upon which a framework for the protection of CDPs can be created.

Last, it should be mentioned that some scholars and policy-makers suggest creating a completely new convention, which will focus specifically on people displaced by climate change. An apparent advantage of this approach is its ability to reflect upon the major problems associated with climate-induced displacement and to take into account all the previous relevant findings. However, the creation of a new legal instrument is a very time-consuming process. It requires bringing together a large number of components, such as political will, creation of respective institutions, and sources of sufficient funding. Therefore, taking into account the urgency of the problem, negotiation of a new instrument might be not feasible.

Overall, it can be concluded that at the current stage, the issue of population displacement as a response to climate change is still associated with numerous uncertainties and remains an issue of debate among scholars and politicians. How to define and conceptualize this group of people remains unclear. This leads to further confusion regarding whether the existing body of international law can regulate the issue of climate-induced displacement and whether it can provide people with a sufficient level of protection. However, as the problem continues to unfold at dramatic speed, the international community cannot afford to further postpone addressing the problem of climate-induced displacement and must decide on the framework suitable for the protection of people displaced by climate change without further delay.