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No Refuge for 'Climate Refugees' in International Law - Tyler Bergeron

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I. Introduction

With virtually no other support, climate-displaced persons look to international law as their saving-grace, but their hopes are misguided. Under current international refugee law, climate-displaced persons do not qualify for refugee status. As another year of unkept emission-reductions promises and weak reductions plans passes, the scale of displacement by climate change grows. Internationally created problems demand international solutions. Developing that solution first requires the international community to promulgate a treaty finally recognizing the status of "climate refugee"—one displaced by climate change, with virtually no means of self-support or receiving support from their State—under international refugee law.

A treaty recognizing climate refugee status should provide the same global protections given to traditional refugees, ensuring that States provide access to courts, education, employment, refugee documentation, and healthcare. Furthermore, such a treaty would protect climate refugees by requiring States to provide asylum to qualifying individuals and imposing the same prohibitions on discrimination and refoulement. By proactively protecting these future refugees, States also could limit the scope of this status and State-obligations owed thereto. Thus, rather than being reactive and waiting until this crisis is out of control, States should promulgate a binding treaty recognizing climate refugee status.

II. Background

Surprising no one, the U.N. climate change Secretariat recently released a report revealing, based on current trajectories, by 2100, the world is not only set to exceed the Paris Agreement's 1.5°C warming target in the next 10 years but will warm to temperatures reaching 2.5°C above pre-industrial temperatures.^[1] Every additional increment of global warming exacerbates changes in weather extremes. In the *Summary for Policymakers* (SPM) of the Sixth Assessment Report (AR6), the Intergovernmental Panel on Climate Change (IPCC) explains "every additional 0.5 °C of global warming causes clearly discernible increases in the intensity and frequency of hot extremes, including heatwaves, and heavy precipitation, as well as ... droughts in some regions."^[2] Climate change will cause long term impacts including reduction of soil fertility, desertification, saltwater intrusion, and coastal erosion.^[3] Resultingly, food security and coastal population hubs are under significant threat.

Sadly, it is probably too late to limit climate change's effects to those already felt. In the AR6's SPM, the IPCC warns that "[g]lobal surface temperature will continue to increase until at least the mid-century under all emissions scenarios considered."^[4] Sea-level will continue to rise for centuries because the global ocean temperature reacts so slowly to changes in atmospheric temperature. The IPCC projects that "relative to 1995-2014, the likely global mean sea level rise by 2100 is ... 0.32-0.62 m under the *low* scenario (SSP1-2.6), 0.44-0.76 m under the *intermediate* scenario (SSP2-4.5), and 0.63-1.01 m under the *very high* scenario (SSP5-8.5)."^[5] The Secretariat's new report reveals the world is headed toward the intermediate or very high scenario without immediate drastic action.

III. The Problem

As these adverse effects set in, climate change will disproportionately affect people globally. States and peoples historically least-responsible for GHG emissions will suffer climate change's most severe consequences; the poorest and most climate-vulnerable states and peoples also lack the necessary resources—whether technological, economic, or social—to adapt to or mitigate the effects of climate change. Weather events continue to intensify, increase in frequency, and affect more people worldwide. Local populations will be forced to evacuate more often than in the past because of extreme weather events and as some regions of the world slowly become uninhabitable.^[6] While difficult to estimate,^[7] the UN International Organization for Migration's forecasts of the number of people expected to migrate due to climate displacement vary from estimating "25 million to 1 billion environmental migrants by 2050...with 200 million being the most widely cited estimate."^[8] Sea level rise alone threatens over 267 million people^[9] living in coastal lands below 2 meters or less above mean sea level and 35 million living at and below mean sea level.^[10] By 2100, 410 million people could live in coastal lands below 2 meters above sea level,^[11] and some estimates predict sea-level rise will swallow 48 countries, mostly island nations.^[12]

Despite this looming humanitarian disaster, current emission reductions plans drastically fall short of the cuts needed to limit climate change to 1.5°C.^[13] And, as mentioned above, those most displaced by climate change will usually be the most helpless with no alternative means of support, thus necessitating a response from the international community. But, under current international refugee law, climate displaced persons do not fit within the traditional definition of a "refugee."^[14] Since the world continues to fail to take adequate measures limiting the damning effects of climate change or to mitigate the scale of the looming humanitarian crisis, the international community must establish a treaty recognizing "climate refugees" under international law.

Rather than waiting, the world should act now before the effects of climate change really take hold and cause constant, widescale climate displacement—*more than that already occurring*. While many climate migrants only need to relocate internally (domestically) to find a more climate stable region (e.g., moving inland to escape sea-level rise and flooding), and although wealthier, developed states can aid its citizens impacted by climate change, the majority of climate migrants are often poorer, less educated, and less able to recover economically in their new homes.^[15] Making matters worse, many internal climate-displaced persons will return after disasters because they lack personal and government resources to either relocate permanently or move far enough away from their affected communities, which will cause many to undergo climate displacement more than once.^[16]

IV. Current Protections for International Climate Refugees

International refugee law is largely established by the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees (together, "the 1951 Convention").^[17] The 1951 Convention states (1) who is a refugee, (2) what legal protections, assistance, and social rights refugees are entitled to receive, and (3) the obligations refugees owe to their host countries. A refugee is

a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution.^[18]

In evaluating persons for potential refugee status, under the 1951 Convention, States are prohibited from discriminating based on sex, age, disability, sexuality, race, religion, and country of origin.^[19] Once a State determines that someone qualifies for refugee status, the Convention requires States to provide asylum for qualifying refugees and, under the principal of non-refoulement, prevents States from sending a refugee to a territory where they fear threats to life or freedom.^[20] While refugees must adhere to the laws of their host-nation, hosting-States are required to provide refugees with access to the State's court system, to a primary education, to work, and to provisions for documentation (like refugee passports).^[21]

Unfortunately, this definition does not cover most climate displaced persons. Except those persons leaving areas where climate change effects caused destabilization (think food scarcity causing regional conflict), most will not qualify for refugee status under the 1951 Convention, even though climate displaced persons may have actually lost their entire homeland, or even country.

As the only widescale binding authority on the definition of refugee status, the 1951 Convention fails climate displaced persons and leaves the international community in a reactive position to respond to climate displacement as the more damning effects of climate change ramp up and take hold. Aside from the 1951 Convention, the only other binding multinational agreement that offers some protections to climate displaced persons is an African accord, the 1969 OAU Convention, which expands on the protections given to refugees in the 1951 Convention. Still, due to its limits as a regional accord and failure to expressly recognize "climate refugee" status, the 1969 OAU Convention ultimately does not provide the protections international climate refugees desperately need.

The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) is a regional accord and offers the broadest protections to refugees; as such, it is a likely convention to expand those protections to 'climate refugees.' Binding on all member states of the OAU, article 1 of the OAU Convention defines refugee exactly as refugee is defined in the 1951 Convention, requiring a "well-founded fear..."^[22] etc., but goes on to state that:

'[R]efugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.^[23]

As extreme weather events and other effects of climate change intensify, climate change is going to cause more and more events 'seriously disturbing public order,' particularly in coastal states and small island developing states (SIDS) where urban centers and entire nations face extreme compound effects of climate change, such as the compound effects of sea level rise, more intense tropical cyclones, and storm surges collectively exacerbating problems like coastal inundation.^[24] While it seems promising for climate displacement, the definition fails to consider the status of "climate refugee" directly, and, more importantly, it fails to set out the states' obligations to refugees when providing asylum but leaves it up to the whims of each country's legislature.^[25] Being only regionally binding, lacking proper recognition of "climate refugee" status, and failing to define States' responsibilities to refugees, the OAU Convention lacks the global protections and status climate displaced persons so desperately need.

Aside from these two treaties, the only other international protections to climate displaced persons arise from a variety of non-binding agreements, such as the Cartagena Declaration of 1984. The Cartagena Declaration tries to address "the massive flows of refugees in the Central American area" by "enlarging the concept of a refugee...as far as appropriate and in the light of the situation prevailing in the region" in accordance with "the precedent of the OAU Convention."^[26] Pursuantly, the Cartagena Declaration recommends that the definition of a refugee (under the 1951 Convention) include "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."^[27] Thus, like the OAU Convention, the Cartagena Declaration's definition of refugee can include climate refugees when climate change events 'seriously disturb public order,' but, unlike the OAU Convention, the Cartagena Declaration is not a binding agreement and is nothing more than an aspirational set of guidelines for countries to voluntarily incorporate into their domestic law and NGOs to incorporate into their practice.^[28]

Since there is not a legally binding global agreement in place to support climate refugees, an international treaty is imperative. Such an international treaty, once promulgated, signed, and ratified, would be binding globally and impose the protections so desperately needed. The current protections provided by regional agreements leave millions of potential refugees helpless. Nonbinding agreements allow States to break their promises without consequence as the obligations agreed therein are rarely kept, but through a legally binding treaty, States breaching their obligations could be held accountable, thereby ensuring the treaty's intent will be met.

V. Conclusion

Climate change is going to displace millions of people over the next several decades. While the overall scale of climate change and climate-cause displacement can be mitigated by a new treaty defining the status of reducing GHG emissions, the international community needs to promulgate a taking treaty defining the action of, obligations to, and obligations of, climate refugees before the effects start exponentially increasing displacement. When hundreds of millions of lives are at stake, and billions, if not trillions, more in dollars are on the line, it is imperative that the world be proactive on this issue. Even if the world cannot come to an agreement on the proper timeline to reduce emissions, surely it can come up with a plan on how to deal with the looming humanitarian crisis that is climate displacement.

[1] UNFCCC Secretariat, *Synthesis Report: Nationally determined contributions under the Paris Agreement*, (Oct. 26, 2022), https://unfccc.int/sites/default/files/resource/cma2022_04.pdf.
 [2] Intergovernmental Panel on Climate Change [IPCC], *Summary for Policymakers, Climate Change 2021: The Physical Science Basis, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, at 19 (Aug. 7, 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf [hereinafter *Summary for Policymakers*].
 [3] Francesco Bassetti, *Environmental Migrants: Up to 1 Billion by 2050*, FORESIGHT: THE CMCC OBSERVATORY ON CLIMATE POLICIES & FUTURES, <https://www.climateforesight.eu/migrations-inequalities/environmental-migrants-up-to-1-billion-by-2050/> (last visited Oct. 30, 2022).
 [4] *Summary for Policymakers*, supra note 2, at 19.
 [5] *Id.* at 28.
 [6] Viviane Clement et al., *Groundswell Part 2: Acting on Internal Climate Migration*, at xxii, WORLD BANK GROUP [WBG] (2021), <https://openknowledge.worldbank.org/handle/10986/36248> [hereinafter *Groundswell Report*].
 [7] It is difficult to estimate the number of people expected to migrate because "diverse factors such as population growth, poverty, governance, human security and conflict all interact with the climate change aspect." Bassetti, *supra* note 3.
 [8] *A Complex Nexus*, INT'L ORG. FOR Migration (IOM), <https://www.iom.int/complex-nexus> (last visited Oct. 28, 2022)(the estimate includes internal and external migration, whether permanent or temporary); The Institute for Economics and Peace (IEP) released a report, the Ecosystem Threat Register (ETR), in September 2018, similarly predicting that at least 1.2 billion people could be displaced by climate threats by 2050. Press Release, Inst. For Econ. & Peace, *Ecological Threat Register Press Release*, (Sept. 9, 2020), [available at https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-2708-FINAL.pdf](https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-2708-FINAL.pdf).
 [9] Tetsuji Iida, *Climate Refugees – The World's Forgotten Victims*, WORLD ECONOMIC FORUM (Jun. 18, 2021), <https://www.weforum.org/agenda/2021/06/climate-refugees-the-world-s-forgotten-victims/>.
 [10] A. HOOPER & R. VERNIMMEN, *GLOBAL LIDAR LAND ELEVATION DATA REVEAL GREATEST SEA-LEVEL RISE VULNERABILITY IN THE TROPICS 2* (2021).
 [11] By 2100, assuming populations in coastal zones remain the same as in 2020, and assuming the mean sea level increased 1 m from 2020 levels, the amount of global coastal lands below 0 m and 2 m above mean sea level is projected to increase 0.52 and 1.46 million km², thereby affecting a population of 129 and 410 million people, respectively. *See id.*
 [12] Amrita Deshmukh, *Disappearing Island Nations Are the Sinking Reality of Climate Change*, QRIUS (May 18, 2019), <https://qrius.com/disappearing-island-nations-are-the-sinking-reality-of-climate-change/>.
 [13] *See supra* note 2.
 [14] Under traditional international refugee law, a refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. *See infra* note 18.
 [15] *Groundswell Report*, supra note 6, at 3.
 [16] *Groundswell Report*, supra note 6, at xxii.
 [17] The 1967 Protocol amended the original 1951 Convention to remove its geographical and temporal constraints. Office of the U.N. High Comm'r for Refugees [UNHCR], *Convention and Protocol Relating to the Status of Refugees: Introductory Note*, at 2 (Dec. 2010), <https://www.unhcr.org/en-us/3b66c2aa10>.
 [18] United Nations (UN), *Convention Relating to the Status of Refugees art. 1(A)(2)*, July 28, 1951, 189 U.N.T.S. 137 (referencing Article I(A)(2) of the Convention as amended by the Protocol) [hereinafter *1951 Convention*].
 [19] *Supra* note 17, at 3.
 [20] *Id.*
 [21] *Id.*
 [22] Organization of African Unity (OAU), *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1*, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter *OAU Convention*]; *see also* United Nations (UN), *Convention Relating to the Status of Refugees art. 1(A)(2)*, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *1951 Convention*].
 [23] OAU Convention, supra note 22, at art. 1(2) [emphasis added].
 [24] IPCC, *Regional Fact Sheet-Small Islands, Climate Change 2021: The Physical Science Basis, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, at 1 (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/factsheets/IPCC_AR6_WGI_Regional_Fact_Sheet_Small_Islands.pdf [hereinafter *Regional Fact Sheet-Small Islands*].
 [25] *See* OAU Convention, supra note 22, at art. 2(1).
 [26] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama art. (3), Nov. 22, 1984, available at <https://www.unhcr.org/en-us/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html> [hereinafter *Cartagena Declaration*].
 [27] *See generally* Cartagena Declaration, supra note 26, at art. 3.
 [28] *Id.*

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