

Climate Change ‘Refugees’ and International Law
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A Introduction

Around the globe, millions of people are at risk of displacement due to climate change. At the end of last year, it was reported that the first inhabited island was submerged as a result of rising sea levels,¹ and island nations across the Central Pacific, South Pacific, and the Indian Ocean, as well as large tracts of land from Bangladesh to Egypt, risk partial or complete displacement by the middle of this century.

The impacts of global warming on habitat are being felt in different ways around the world. Rising sea levels are threatening the very existence of small island States, while Inuit communities in North America and Greenland fear displacement due to melting ice. Climate-induced displacement is of particular relevance to Australia given its geographical proximity to islands such as Kiribati and Tuvalu, where whole nation displacement is imminent. Australia is an obvious destination country in the region for so-called climate change ‘refugees’.

Although precise numbers of those likely to be displaced as a result of global warming are impossible to ascertain, scientists place the figure at somewhere between 50 million and 250 million in the next 50 years.² Yet, people forced to move as a

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¹ G Lean, ‘Disappearing World: Global Warming Claims Tropical Island’, *The Independent* (24 December 2006), referring to research by Jadavpur University’s School of Oceanographic Studies.

² See N Myers, ‘Environmental Refugees in a Globally Warmed World’ (1993) 43 *BioScience* 752; Intergovernmental Panel on Climate Change, *Third Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, Cambridge, 2001). In 2005, Myers revised his estimate, suggesting that it could be up to 200 million: N Myers, ‘Environmental Refugees: An Emergent Security Issue’ (13th Economic Forum, Prague, 23–27 May 2005). Sir Nicholas Stern described this as a ‘conservative’ assumption: N Stern, *The Economics of Climate Change: The Stern Review* (CUP, Cambridge, 2007). Myers has more recently revised this figure as closer to 250 million: interview with Christian Aid (14 March 2007), cited in Christian Aid, *Human Tide: The Real Migration Crisis* (2007) 50 endnote 10. Christian Aid adopted this figure in its own estimates: 6. See also figures in S Byravan and S Chella Rajan, ‘Providing New Homes for Climate Change Exiles’ (2006) 6 *Climate Policy* 247.

result of climate change do not fit the international legal definition of ‘refugee’, which requires individuals already outside their country of origin to show that they have a well-founded fear of being persecuted *because of* their race, religion, nationality, political opinion or membership of a particular social group. As a result, the rights, entitlements and protection options for people displaced by climate change are uncertain in international law, and there is no international agency, such as the United Nations High Commissioner for Refugees, with a mandate to assist them.

Earlier this year, the Intergovernmental Panel on Climate Change observed that ‘[m]ost of the observed increase in globally averaged temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations’,³ which has ‘*very likely* ... contributed to a rise in mean sea level’.⁴ It is now more than 95% certain that global warming over the past 50 years is only explicable because of human activities. Yet, while moral or factual accountability for global warming may be attributable to particular countries, establishing legal *causation* and responsibility is very difficult.

In March 2007, the Inuit of the Arctic regions of the United States and Canada sought a declaration from the Inter-American Commission on Human Rights that the United States was responsible for irreparable changes to their environment.⁵ They argued that impacts of global warming and climate change, caused by acts and omissions of the United States, violated their fundamental human rights, including their rights to the benefits of culture; to property; to the preservation of health, life, physical integrity, security, and a means of subsistence; and to residence, movement, and inviolability of the home.

³ Intergovernmental Panel on Climate Change, *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (CUP, New York, 1990) 8 (fn omitted).

⁴ GC Hegerl and others, ‘Understanding and Attributing Climate Change’, in S Solomon and others (eds), *Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP, Cambridge, 2007) 729.

⁵ Petition to the Inter American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States (7 December 2005) 1 http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

Like many indigenous peoples, the Inuit have an intimate relationship with the land. Their culture, economy and identity depend upon the ice and snow. In a 200 page petition, representatives for the Inuit Circumpolar Conference outlined how animals on which the Inuit rely are disappearing, damaging their subsistence harvest and health; thawing permafrost is causing landslides and complicating food storage; and travel is increasingly dangerous and difficult due to unpredictable weather, with the warmer climate making traditional knowledge about the safety of sea ice unreliable, and more people drowning each year.

At the other end of the globe, inhabitants of Papua New Guinea's Carteret Islands are preparing to leave for mainland Bougainville, with rising sea levels making their traditional homeland uninhabitable.⁶ Not only are the islands expected to be submerged by 2015, but the islanders' traditional livelihoods are also being destroyed due to salt water contamination, severe storms and the destruction of ecosystems on which they depend. The islands are only one-and-a-half metres above sea level, and at high tide areas that were once fertile agricultural plots are submerged by the sea. This incursion of salt water 30 to 40 metres inland, which began in the late 1970s, has made their traditional livelihoods and food sources impossible, with traditional crops of bananas and sweet potato no longer able to grow. The constant wet ground has also led to an increase in mosquitoes, which has led to an increase in malaria. The islanders' diet is limited now to fish, coconut and seaweed, supplemented by rice delivered from the mainland once every six months. These changes to diet have led to increased rates of diabetes and diarrhoea. The people of the Carteret Islands see their relocation to Bougainville as the only viable option, despite the fact that it remains a dangerous place rife with automatic weapons that remain from the conflict. Despite the perils they face, it is not an easy decision to move. It means uprooting cultural, family and traditional ties, and leaving an ancestral home. Some of the islanders would rather drown than move at all.

⁶ See eg J Stewart, 'Rising Seas Force Carteret Islanders out of Home', Lateline, ABC television (5 February 2007) Transcript <http://www.abc.net.au/lateline/content/2006/s1840956.htm>. Though described as 'among the world's first environmental refugees', they are more accurately characterized as internally displaced people, since their movement does not require the crossing of an international border. On 'refugee' terminology in this context, see below; K Romer, "'Environmental' Refugees?" (2006) 25 *Forced Migration Review* 61. Much of the information that follows on the Carteret Islands comes from a talk given by islander Ursula Rakova (Brown Street Community Hall, Newtown, 14 September 2007).

But are the Carteret Islanders, or the Inuit people, ‘refugees’, or simply victims of environmental catastrophe, and is this relevant to international responses? Do States have international legal obligations to ‘protect’ people displaced by climate change? Do States which emit particularly high levels of greenhouse gases, or which refuse to agree to binding targets to reduce their emissions, have any special responsibilities? Should flight from habitat destruction be viewed as another facet of traditional international protection, or as a new challenge requiring new solutions?

The answers to these questions are not straightforward, and depend upon a principled analysis of the obligations States have voluntarily accepted under an array of different treaties and practices.

B Refugee Law

First, although refugee law does not strictly apply, certain protective principles, and the status envisaged for those displaced, might be relevant. In particular, the principle that no one should be sent back to persecution or other forms of serious harm (the principle of *non-refoulement*) is key.

People displaced by climate change do not qualify as ‘refugees’ under international law. The refugee definition under international law is contained in a 1951 treaty, the Refugee Convention, and reflects its post-World War II context. It defines refugees as people who are outside their country of origin, with a well-founded fear of persecution on account of their race, religion, nationality, political opinion or membership of a particular social group.

The requirement of exile poses an instant definitional problem for those who have not yet moved. Indeed, many of those displaced by climate change are ‘internally displaced people’ (IDPs), the subject of soft law principles rather than binding treaty obligations. Furthermore, while UNHCR is the lead agency for IDPs, it deals only with IDPs forced to move as a result of conflict. There is an obvious institutional gap. Ironically, there is a danger that climate-induced displacement will create conflict as

resources become increasingly scarce. It would be the ultimate perversion if UNHCR's mandate were triggered due to non-action making a non-violent situation escalate to one of conflict. Ironically, this may have been the case in relation to Darfur; according to UN Secretary-General Ban Ki Moon, the situation in Darfur 'began as an ecological crisis, arising at least in part from climate change', with increasing food insecurity and lack of rainfall—and ultimately insufficient food and water for the population—leading to conflict.⁷

Secondly, the Refugee Convention says that 'refugees' are people who are unable or unwilling to return to their country of origin because of a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.⁸ An immediate obstacle to locating environmental displacement within the framework of international refugee law is characterizing it as *persecution*. Storms, earthquakes and floods may be harmful, but they do not constitute 'persecution' according to the way that term has been interpreted.

Thirdly, even if it were possible to establish legal causation, the Refugee Convention poses an additional hurdle for those displaced by climate change: namely, that persecution is *on account of* the individual's race, religion, nationality, political opinion, or membership of a particular social group. Movement precipitated by climate change is inevitably indiscriminate.

That said, global warming has particularly dire consequences for developing countries which lack the resources to combat it. The outlook for similarly low-lying countries such as The Netherlands and Bangladesh is vastly different, with the former able to safeguard itself from rising seas through the construction of dykes and sea walls, while the latter remains exposed to considerable land submersion due to a lack of resources and technology to prevent this,⁹ with 17 million people currently living less than one metre above sea level.

⁷ Ban Ki Moon, 'A Climate Culprit in Darfur' (16 June 2007) www.washingtonpost.com A15.

⁸ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2), read in conjunction with Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

⁹ S Butzengeiger and B Horstmann, 'Sea-Level Rise in Bangladesh and the Netherlands: One Phenomenon, Many Consequences' (Germanwatch, 2004); World Bank, *Bangladesh: Climate Change and Sustainable Development* (Report No 21104 BD, 10 October 2000) Ch 2.

C Definitions

The inapplicability of international refugee law is linked to the challenge of how to describe people displaced by climate change. Since 1985, the term ‘environmental refugees’ has been floating about,¹⁰ but the choice of the term ‘refugee’ is highly controversial.¹¹ Although it provides a useful descriptor of displacement, it does not accurately reflect in legal terms the status of those who move.¹² Politically and legally, it is provocative, but also reflects the law’s inadequate response to dealing with displacement of this kind. At the most basic level, it highlights the absence of analysis in international law of the movement of people spurred by climatic rather than directly political upheaval; at the same time, the human element of the upheaval cannot be ignored, since governments’ failure to reduce greenhouse gas emissions has, ultimately, contributed to the situation.¹³

Interestingly, it is my understanding that representatives for Kiribati have eschewed the refugee label, fearing that it might lead to scattered, individual, and uncoordinated resettlement breaking down cultural integrity, heritage and—fundamentally—the sense of a Kiribati State and people. What they would prefer is a government-in-exile; the continuation of an imagined community once the physical territory disappears.

Once a people become state-less, are they stateless as a matter of international law? In other words, do people at risk of whole nation displacement fit within the international legal regime on statelessness? Despite literal, physical statelessness being the factual outcome, the two international statelessness treaties do not anticipate

¹⁰ See, for example, N Myers and J Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (The Climate Institute, Washington DC 1995); E El-Hinnawi, *Environmental Refugees* (UN Environment Programme, 1985); A Suhrke and A Visentin, ‘The Environmental Refugee: A New Approach’ (1991) *Ecodecision* 73.

¹¹ Interestingly, the Australian Labor Party uses the term ‘climate change refugees’, implying a sense of legal recognition and obligation: *Our Drowning Neighbours: Labor’s Policy Discussion Paper on Climate Change in the Pacific* (ALP, 2006).

¹² See, for example, D Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2004) 16 *Georgetown Intl Environmental L Rev* 209.

¹³ Even though scientists project that by the mid-21st century, all climatic events will be the result of human activity (T Flannery, *The Weather Makers: The History and Future Impact of Climate Change* (Text Publishing, Melbourne, 2005) 164), this remains problematic as a matter of establishing *legal* causation.

this eventuality and therefore do not encompass this notion in their conceptualization of statelessness.¹⁴ The legal definition of ‘statelessness’ is premised on the denial of nationality through the operation of the law of a particular State, rather than through the disappearance of a State altogether. It deliberately embodies a very narrow and legalistic understanding of statelessness, and does not even extend to the situation of *de facto* statelessness, namely where a person formally has a nationality, but which is ineffective in practice.

D History of Protection

It is worth recalling, though, that although climate-induced displacement challenges the assumptions which the international community has made about protection needs, those assumptions were not self-evident at the beginning of the construction of an international legal regime in the 1920s. The strong human rights imperative which we now associate with refugeehood only emerged in the language of protection in the 1940s, 20 years after the international community made its first attempts to regulate the flow of people forced to flee their homes.

We also have to remember that this is not the first time that the world has been faced by mass displacement. At the end of the Second World War, some 66 million people were displaced across Europe, with millions more in China.¹⁵ At that time, the international community ‘responded with vision and imagination to tackle what must have seemed like an intractable problem.’¹⁶ The ‘solution’ was the creation of progressive United Nations institutions to assist with repatriation and resettlement. Between May and September 1945 alone, some 7 million people were repatriated. Half a century later, we are at another crossroad, this time with displacement arising for different reasons, and with the prospect of repatriation not viable.

E Human Rights Law

¹⁴ Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117; Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

¹⁵ UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action* (OUP, Oxford, 2000) 13.

¹⁶ Christian Aid, *Human Tide: The Real Migration Crisis* (2007) 3.

How, then, might international human rights law assist?

Respect for human rights can be viewed as one of the key modern principles of international relations. Yet it competes, and at times comes head to head, with other fundamental principles of international order, such as the principles of the sovereign equality of States and non-interference in other States' domestic affairs. Massive infringements of human rights are seen as violations which are of general international concern, and which make the State that inflicts them accountable to the whole international community. This means that in theory, any other State may seek to hold the offending State accountable, although in practice they prefer to diffuse the tension of this bilateral mechanism and instead go through international organizations such as the UN machinery, which in turn may result in more effective sanctions.

Under human rights law, everyone has the right to life.¹⁷ The Inter-American Commission on Human Rights has recognized that realization of the right to life is necessarily linked to and dependent on the physical environment.¹⁸ Everyone also has the right not to be subjected to cruel, inhuman or degrading treatment.¹⁹ International law recognizes that if people are at risk of such treatment in their country of origin, then they must not be sent back there. Every person has the right to an adequate standard of living, including adequate food, clothing, housing and the continuous improvement of living conditions,²⁰ and the right not to be deprived of means of subsistence.²¹ These can all be seen as necessary components of the right to life, which are compromised where global warming leads to the destruction of people's ability to hunt, gather, or undertake subsistence farming. People also have the right to enjoyment of the highest attainable standard of physical and mental health,²² and the right to take part in cultural life. Ethnic, religious, linguistic or indigenous²³

¹⁷ International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

¹⁸ *Report on the Human Rights Situation in Ecuador* OEA/Ser.L/V/II.96 Ch 8; *Yanomami case* (case 7615 of 5 March 1985), cited in annual report of the Inter-American Commission on Human Rights, 1984-85, OEA/Ser.L/V/II.66, doc 10 rev.1.

¹⁹ ICCPR art 7.

²⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 11.

²¹ Art 1(2) ICCPR and ICESCR.

²² ICESCR art 12.

²³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 30.

minorities must be allowed to enjoy their own culture, practise their own religion, and use their own language.²⁴ The Inter-American Commission on Human Rights has acknowledged that ‘the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities’.²⁵ It has been argued that interference with these rights may lead to forced assimilation, which the right to culture is intended to prevent.²⁶

From a protection perspective, one problem is that under human rights law, States generally only have direct human rights obligations to people already in their territory or jurisdiction. Furthermore, even if a person forced to move due to climate change manages to reach the territory of another country, only a handful of these human rights are presently recognized as giving rise to a protection obligation on the receiving State’s part—in other words, preventing that person’s return. It may therefore be necessary to try to recharacterize the violated human right, for example, violation of the right to an adequate standard of living, as a form of inhuman treatment, which *is* a right giving rise to international protection, but it is doubtful whether such violations which are not inflicted by the hands of the State which is being fled, will be seen as giving rise to a protection need.

Further, this traditional western approach of individualized decision-making on technical legal grounds seems highly inappropriate to the situation we are presently facing.

F Environmental Law

By contrast, climate change and the global atmosphere are a ‘common resource’ of vital interest to humanity.²⁷ International environmental law requires States to implement programs for mitigating greenhouse gas emissions; to prevent, reduce and

²⁴ ICCPR art 27.

²⁵ *Maya Indigenous Communities of the Toledo District (Belize Maya)* Case 12.053 Inter-American Commission on Human Rights (2004) para 120.

²⁶ See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* 76, OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983) para II.B.15.

²⁷ See Recommendations of the International Meeting of Legal And Policy Experts, Ottawa Canada, 19 EPL (1989), 78.

control pollution of the atmosphere and the marine environment; and to conserve biodiversity. The latter are relevant where displacement is due to a loss of livelihood or resources resulting from disappearing plant and animal species. Furthermore, States are prohibited from using their territory in a way that causes harm beyond their borders.

There is a basic principle of customary international law that says that every State has an obligation not to knowingly allow its territory to be used for acts that are contrary to the rights of other States.²⁸ In the Inuit claim, lawyers argued that that principle provided a context for assessing States' human rights obligations with respect to global warming, because the emission of greenhouse gases in one State causes harm in others.²⁹ This carries a presumption that States should, at a minimum, engage in international efforts to address global warming, and by failing to ratify the Kyoto Protocol, States like Australia and the US cannot be said to be doing so. Mere ratification is not enough – States must ensure that the international system is sufficiently strong to protect human rights, which means that if this cannot be achieved through international collaboration alone, domestic measures must be taken to ensure that such rights are protected.

As Judge Weeramantry of the International Court of Justice has said:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] ... for numerous human rights such as the right to health and the right to life itself.³⁰

G Institutional Framework

Finally, the absence of an institution with responsibility for climate-induced displacement also poses a challenge. Although the United Nations Environment Programme introduced the issue of environmental displacement on to the international

²⁸ *Corfu Channel case* (UK v Albania) 1949 ICJ 4, 22.

²⁹ Earthjustice, 'Global Warming and Human Rights: Testimony of Martin Wagner before the Inter-American Commission on Human Rights' (1 March 2007) 3.

³⁰ *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) 1997 ICJ 92 (Separate Opinion of Judge Weeramantry), at para A(b).

agenda over 20 years ago, there remains no international organization charged with official responsibility for the issue.

While UNHCR might seem the obvious contender, it is already responsible for over 20 million displaced people. Each year it relies on donations and the goodwill of States to provide it with funds to carry out its work in 116 countries, and it has experienced significant budgetary crises over the years. Is it the appropriate agency to tackle the issue of climate-induced displacement? From a legal standpoint, it presently has no mandate to do so, and from a practical point of view, can it actually assume a protection or assistance function for over double the number of people for whom it already cares? It is seen as the institution with the best experience in the area, as we saw when UNHCR assisted after the Boxing Day tsunami, even though it was not formally mandated to assist. On the other hand, the root causes for displacement are very different. UNHCR is already overburdened and financially under-resourced to carry out its existing protection functions. It is of interest to note that the newly created UN website on climate change does not feature a single human rights-related agency on its list of interested UN parties.

Because there are numerous cross-cutting and intersecting issues raised by climate-induced displacement which relate to a variety of institutional different mandates (such as protection, human rights, indigenous rights, cultural rights, and the environment), there is a risk that the concept will be dealt with in an ad hoc and fragmented manner—if at all—rather than through a single organization with a focused, holistic approach.

H Conclusion

The status, treatment and protection of people displaced as a result of climate change is thus uncertain as a matter of international law. It is therefore imperative to identify and analyse the obligations which States have under international and regional refugee law, human rights law, cultural protection laws, and environmental law to determine which elements may be relied upon to promote a principled protection response to people at risk of climate-induced displacement. To provide maximum protection, international treaties must not be viewed as discrete, unrelated documents, but as

interconnected instruments which together constitute the obligations to which States have agreed.

My concern is not primarily about finding ways to hold individual States accountable for breaches, but rather to pinpoint their responsibilities at the outset to demonstrate how forced movement due to climate change should be addressed from a legal perspective. It is intended to guide action—both in terms of showing that there is a need to do something, as well as in shaping what is done. It is dangerous to see the law as *the* solution; ultimately, even getting acknowledgement of legal obligations requires a political response, and certainly to get to the next step of a treaty, requires a serious commitment, in terms of substance, time and resources, and a willingness to acknowledge the fundamental issues. At this stage, the law may assist us by setting out the minimum standards by which States should inform their responsibilities towards impending climate-induced displacement, providing a principled legal framework for examining States' responses and a threshold against which their actions may be assessed.