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Mara Elisa Andrade

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CLIMATE MIGRATION BEYOND THE REFUGEE FRAMEWORK: CREATING BRIDGES BETWEEN HUMAN RIGHTS AND INTERNATIONAL CLIMATE LAW

Mara Elisa Andrade*

INTRODUCTION

The climate crisis is an existential threat facing life on Earth. It is increasing the frequency of extreme weather events, intensifying floods and droughts, warming oceans, raising sea levels, eroding coastlines, and disrupting ecosystems.¹ The synergies between these impacts jeopardize livelihoods and disrupt societies—exacerbating inequalities, vulnerabilities and poverty.² Aware of such impacts, the 1990 Intergovernmental Panel on Climate Change (“IPCC”) First Report predicted “the greatest effect of climate change may be those on human migration.”³

This essay presents a brief overview of the complex nature of climate-related migration. In doing so, it departs from the critical analysis of framing individuals affected by the phenomena as climate refugees, arguing instead that such status is too narrow in scope. Rather, this essay discusses current proposals for a comprehensive and cooperative approach that highlights the interface between the fields of human rights and climate change law.

I. CHALLENGES DESIGNATING INDIVIDUALS DISPLACED BY CLIMATE CHANGE AS “REFUGEES”

Designating individuals displaced by climate-related events as refugees imposes obligations on receiving States to provide for the safety and welfare of those individuals, including the duty to uphold internationally-established human rights standards and the prohibition of refoulement.⁴ However, refugee designation has limited applicability in the context of climate-related migration.⁵

Article 1(A)(2) of the 1951 Convention on Refugees,⁶ and amendments by its 1967 Protocol,⁷ legally defines “refugees” as a person fleeing his country of nationality or residence out of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”⁸

Based on this definition, the first problem with framing climate migrants as refugees is that most climate-related migration occurs within a State’s borders.⁹ Additionally, establishing persecution involves showing serious human rights violations accompanied by a discriminatory element.¹⁰ Climate change does not necessarily entail deliberate and intentional harm inflicted by the State on specific individuals or groups on a discriminatory basis or in ways serious enough to meet the

persecution standard.¹¹ As Jane McAdam¹² explains, “although adverse climate impacts such as rising sea levels, salination, and increases in the frequency and severity of extreme weather events (e.g. storms, cyclones, and floods) are harmful, and in some cases fatal, they do not meet the threshold of ‘persecution’ as this is currently understood in international and domestic law”. There is a material legal difference between the “‘mere’ non-realization of a right”¹³ on one hand, and the serious and persistent breach of human rights motivated by “an attribute — real or perceived — of the person being persecuted” on the other.¹⁴

The standard requirement to establish States as “persecutors” is also hard to meet because the States facing the most dire impacts of climate change are the most poorly positioned to address its effects¹⁵ or adequately uphold human rights standards in the face of magnified crises. Therefore, even if climate hazards and harms are serious enough to amount to persecution, it is unlikely that the State of origin constitutes a persecutor, unless the “government consciously withheld or obstructed assistance in order to punish or marginalize”¹⁶ individuals or groups on discriminatory grounds.

Finally, because the “refugee” designation hinges on proof of persecution, categorizing individuals as climate refugees requires focusing attention on causation, which raises an issue of justice.¹⁷ States that have contributed the most to the climate change are not the ones facing the most pressing obstacles to dealing with the devastating consequences of the crisis—meaning the costs of their actions are borne disproportionately by others.¹⁸ Furthermore, climate change causes migration by amplifying preexisting vulnerabilities rather than by serving as a distinctive cause of migration, making it hard to single out climate change as the predominant cause of human movements.¹⁹

II. PROPOSALS TO ADDRESS CLIMATE-RELATED MIGRATION

To overcome these difficulties, some commentators call for a new treaty, under the umbrella of the United Nations Framework Convention on Climate Change (“UNFCCC”), capable of taking into consideration the complex and unique nature of climate-induced migration.²⁰ Others note there is little appetite in international relations for a new binding instrument

*Judge Mara Elisa Andrade. American University Washington College of Law, L.L.M. 2021

on climate refugees because of concerns over territorial integrity and national security.²¹

To fill this “normative gap”²² in international law, commentators suggest shifting the focus of the analysis from causation to the needs of those displaced by climate change.²³ This would enable better use of existing frameworks under human rights and climate change law, and would enhance international cooperation.²⁴

A. INCORPORATING CLIMATE RELATED MIGRATION INTO THE BROAD HUMAN RIGHTS’ APPROACH

In 1998, the UN High Commissioner for Refugees adopted the Guiding Principles on Internal Displacement (“GPID”),²⁵ which served as a major first step to bringing climate migrants under the protection of human rights laws by setting human rights standards for internal displacements. Extending human rights’ protections for internal displacements is particularly important as climate change intensifies and most climate related displacement remain within national borders. In 2017, the global number of people internally displaced by disasters (18 million people) outstripped those displaced by conflict (11 million)²⁶—highlighting the growing need to develop a legal framework for internal migration.

From an institutional perspective, the Inter-Agency Standing Committee (“IASC”)²⁷ created by the United Nations (“UN”) General Assembly Resolution 46/182, has a mandate to ensure preparedness and response efforts, emergency relief, and other assistance measures for humanitarian crises that might involve climate-related disasters. Furthermore, the Hyogo Framework for Action (2005 to 2015)²⁸ and the 2015 Sendai Framework for Disaster Risk Reduction²⁹ have brought additional improvements regarding sudden-onset climate impacts and disaster/risk management. The Hyogo Framework for Action sets strategies for building resilience, while the Sendai Framework provides express guidance on climate induced disasters. Both also set human rights standards.

B. ADDRESSING CLIMATE RELATED MIGRATION WITH EXISTING NORMS UNDER INTERNATIONAL CLIMATE CHANGE LAW

To complement the human rights approach to climate induced migration, scholars³⁰ suggest using the UNFCCC³¹

— specifically articles 3 and 4.8 of the 1992 Convention.³² International climate change law provides great latitude to boost cooperation and bring attention to the needs of countries most vulnerable to climate change. This approach is reflected on the 2007 Bali Action Plan,³³ the 2010 Cancún Agreement,³⁴ the Warsaw International Mechanism,³⁵ and the Paris Agreement,³⁶ which all embrace concerns over climate migration and displacement.

International climate change law offers important norms for integrating climate migration into all four structural pillars of the climate regime: mitigation, adaptation, finance, and oversight.³⁷ For instance, effective mitigation could keep climate impacts within a manageable scale, while adaptation measures could prevent displacement, build resilience, and protect vulnerable communities. Recognizing that climate migration belongs to the field of international climate change law, numerous countries embraced commitments on migration and displacement in their NDC’s under the Paris Climate Agreement.³⁸

CONCLUSION

As the devastating impacts of climate change exacerbate preexisting vulnerabilities and socioeconomic stressors — directly affecting the enjoyment of human rights and influencing human mobility within and across borders³⁹ — it is important to integrate human rights law into the legal framework for climate-related migration. Doing so will expand the conversation beyond the narrow scope of international refugee law.

Amplifying the legal response to encompass both human rights and climate change legal regimes could reinforce legal systems while enhancing efforts to prevent displacement from happening in the first place. It would also create a collective duty to protect vulnerable communities disproportionately affected by climate change’s pervasive impacts.

Human rights law invites us to shift the focus away from the complex causation inquiries of migration and displacement, leaning instead towards the unique needs of individual communities affected by natural disasters. Additionally, international climate change law complements the approach by providing for a persuasive narrative towards greater international cooperation and solidarity between States, which could improve attainment of international mitigation and adaptation goals. 🌍

ENDNOTES

¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 7–8 (Rajendra K. Pachauri et al. eds., 2015).

² STEPHANE HALLEGATTE ET AL., SHOCK WAVES: MANAGING THE IMPACTS OF CLIMATE CHANGE ON POVERTY 36–38 (2016) (finding shocks to price of goods, destruction of assets from natural disasters, death and illness due to environmental and climate conditions, and employment opportunity converge to push people into poverty).

³ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE 1990 AND 1992 IPCC ASSESSMENTS (1992).

⁴ The Refugee Convention embraces non-refoulement in Article 33, which prohibits a receiving State from expelling or returning a person to a country where his or her freedom or life would be threatened based on race, religion, nationality, membership of a particular social group, or political opinion.

Convention Relating to the Status of Refugees, art. 33, July 12, 1951, 189 U.N.T.S. 137 [hereinafter Convention on Refugees]; see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (prohibiting refoulement where a person faces the possibility of torture).

⁵ JANE McADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 43 (2012) (noting that the requirement of cross-border movement will be difficult to establish considering most climate migration will be internal, and probing the difficulty of demonstrating “climate change” as “persecution”).

⁶ Convention on Refugees, *supra* note 4, art. 1(A)(2).

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