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Closing the Legal Gap to Protect the Victims of Climate Change Induced Displacement

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Introduction

This contribution describes climate change induced displacement (CCID), the legal norms protecting persons affected by it, and how existing law provides the basis for such protection. We argue that even today there is law and there are actors that can provide this protection. Although we do not deny that the law and the mandates of actors can be improved, we suggest that the

immediate priority should be ensuring that persons subject to CCID are protected.

The Dimensions of the Problem

CCID refers to the movement of persons who are forced to leave their place of habitual residence due to the adverse effects of climate change both direct and indirect.¹ The significance of climate induced displacement is indicated in the *Global Estimates 2014: People displaced by disasters*, which notes that in 2013, “rapid-onset disasters associated with climatic and weather hazards such as floods, storms and wildfires, and geophysical hazards such as earthquakes and volcanic eruptions, displaced 21.9 million people....[t]his is almost three times as many as newly displaced by conflict and violence in 2013.”²

CCID is a human adaptation strategy,³ but also one that is forced upon people involuntarily. In other words, a person subject to CCID does not merely decide to leave his or her place of residence, but is forced to do so because of the changing climate. It is equally important to remember that like persecution from which refugees traditionally flee, climate change is man-made. One need not even delve into the science to understand this, because more States than have ratified the Charter of the United Nations have stated in article 1, paragraph 1, of the UN Framework Convention on Climate Change (UNFCCC) that climate change is “attributed directly or indirectly to human activity.”⁴ Thus CCID, like persecution, affects people fleeing a man-made threat to their well-being.

The problem of CCID is likely to grow significantly in the coming years as the world has already missed the deadline to take responsible action to prevent some of the most serious adverse effects of climate change. These serious consequences of climate change will occur if the global temperature rise is above 2°C and currently we are on a path towards a rise of about 4°C. To ensure global temperatures stay within the limits demanded by science and to avoid the hardships predicted, according to the Nobel Prize winning International Panel on Climate Change,⁵ global emissions of carbon dioxide would have to reach their highest levels by 2015 and thereafter fall.⁶ This is no longer possible.

1 □ Barnett, J. & Webber, M., *Accommodating Migration to Promote Adaptation to Climate Change*, Commission on Climate Change and Development, Stockholm (2009).

2 □ Internal Displacement Monitoring Centre and Norwegian Refugee Council, *Global Estimates 2014: People displaced by disasters* 18 (September 2014).

3 □ McLeman, R. *Climate and human migration. Past experiences, future challenges*: Cambridge University Press (2013), p. 3.

4 □ 1771 UNTS 107 (1994).

5 □ IPCC, *Climate Change 2007: Synthesis Report*, p. 66, n. 26 (2007).

6 □ *Id.* Also See Meinshausen, M., “On the risk of overshooting 2°C,” paper presented at Scientific Symposium ‘Avoiding Dangerous Climate Change’, Met Office, London, UK (February 2005); Parry, M., Palutikof, J., Hanson, C., and Lowe, J., “Squaring up to reality,” *Nature* (2008) available at <http://www.nature.com/climate/2008/0806/full/climate.2008.50.html#top> (accessed 30 July 2012).

The UNFCCC⁷ evidences agreement on this objective, as well as the principles and the commitments necessary for achieving adequate action to protect the planet's atmosphere. Nevertheless, it increasingly appears that there is no global will to achieve this goal.⁸ Given this bleak prognosis, there is an increasing urgency to find ways to deal with climate induced displacement, one of the most harrowing adverse effects of climate change.

While natural disasters are often not caused but exacerbated by climate change, they are also only one example of an adverse effect of climate change that causes forced migration. Moreover, while the most significant adverse consequences of climate change have yet to be felt, the adequacy of response mechanisms and funding are also yet to be agreed upon. As a result it is possible that the number of persons subject to CCID could increase significantly. This makes the protection of migrants subject to CCID a priority.

Existing International Law Offering Protection to Climate Induced Migrants

People everywhere are protected by norms of international law to which their countries have agreed in treaties or which have entered into the realm of customary international law.⁹ There are dozens of human rights treaties that can be used to ensure persons' rights to humane treatment, life, property, freedom of movement and the basic economic and social necessities of life are respected.¹⁰

Many of these instruments include treaty bodies to help enforce these rights and where they do not there are often Special Procedures created by the United Nations Human Rights Council that can contribute to enforcing the human rights in treaties or under customary international law.¹¹ There are also numerous regional treaties and bodies that can enforce the human and peoples' rights therein, sometimes in a legally binding manner.¹²

International refugee law, specially created to protect the victims of forced migration, is also often viewed as inadequate to provide protection to deal with CCID. The United Nations Refugee Convention,¹³ for example, only protects individuals fleeing across international boundaries from prescribed types of persecution in their State of nationality or habitual residence. It does not

7 □1771 UNTS 107 (1994).

8 See Doebller, C., "Compromises and Double-Speak: The Lima Climate Summit: a Failure in All but Name," *CounterPunch* (22 December 2014) accessed at <http://www.counterpunch.org/2014/12/22/the-lima-climate-summit-a-failure-in-all-but-name/> (10 January 2014).

9 □Special Rapporteur on the Human Rights of Migrants (2012), *Human Rights of Migrants, Thematic Report: Climate Change and Migration*, UNGA A/67/299 (13 August 2012).

10 □See, generally, Doebller, C.F.J., *International Human Rights Law: Cases and Materials* (2004).

11 □See Ramcharan, B.G., *The UN Human Rights Council* (2011) (discussing the protection role of the Human Rights Council) and Ramcharan, B.G., *The protection roles of UN human rights special procedures* (2009).

12 □See Shelton, D., Carozza, P.G., Wright-Carozza, P., *Regional Protection of Human Rights* (2nd ed., 2013).

13 □189 UNTS 137 (1951).

provide protection from natural disasters. This treaty, however, is not the only international instrument offering protection to refugees. Both in the African and Central American context, dozens of States have agreed to extend the definition of persons protected as refugees to persons fleeing across international boundaries due to significant disturbances to public order in their State of nationality or habitual residence. While these instruments, one of which is legally binding on States and the other an agreed authoritative interpretation of legal obligations by States, do not provide obligations for the majority of States in the international community, as will be suggested they may still provide climate induced migrants adequate protection.

In the African context, the Convention Governing the Specific Aspects of Refugee Problems in Africa,¹⁴ which entered into force on 20 June 1974, states that henceforth the almost fifty States that have ratified this treaty recognize that

[t]he term 'refugee' 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.¹⁵

The words “events seriously disturbing public order” were intended to expand the definition to include natural events such as famines or disease epidemics. Although climate change was not as well-defined nor as feared in 1974 it would seem logical that it should be included in such a broadening of the definition of refugee. Such an interpretation of the terms of this legally binding treaty would not only be consistent with its object and purpose, which is to protect Africans forced to migrate due to particularly aggressive harm, but it would also be consistent with an understanding of the terms of the 1974 Convention in light of developments among African States.

The Cartagena Declaration on Refugees¹⁶ adopted on 22 November 1984 builds on the African Convention and reflects the unilateral undertaking of about a dozen Central American States

[t]o reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because

14 □ 1001 UNTS 45 (1974).

15 □ *Id.* at art. 1, para. 2.

16 □ Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

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.¹⁷

The terms of this Declaration pre-date the most alarming realizations about climate change, but applying the same rationale as in the African context, it would seem sensible to understand climate induced migrants to be covered. Therefore, as there appears to be a *prima facie* case for the protection of climate induced migrants under regional refugee law, it is necessary to understand whether these regional instruments provide a wider protection to climate induced migrants or climate refugees.

The UNHCR, the primary international body providing protection to refugees or persons forced to flee persecution and often internally displaced persons, has rejected climate induced migrants or climate change as falling under the 1951 UN Refugee Convention.¹⁸ UNHCR's mandate is primarily based on the 1952 Convention relating to the Status of Refugees and its Statute, both of which contain narrow definitions of a refugee. These definition do not appear to cover persons subject to CCID, even when they cross an international border. This, however, is not the end of the protection issue.

UNHCR also has an expanded protection mandate. As a programme of the United Nations, UNHCR's mandate may be expanded, for example, by a principal body of the United Nations. In the early 1970s the Economic and Social Council of the United Nations requested UNHCR to offer protection to internally displaced persons.¹⁹ Since September 2005, UNHCR has in fact assumed the lead role in protecting internally displaced persons under the Inter-Agency Standing Committee approach to crises mandated in the General Assembly.²⁰ In practice it would seem that UNHCR, the United Nations agency with the most significant resources and with past experience in protecting displaced persons, has agreed to accept the mandate to protect persons subjected to CCID.

Moreover, UNHCR itself appears to accept this mandate by interpreting the African Refugee Convention, although not applicable to all countries, to expand its protection mandate everywhere in the world stating that in addition to individuals who meet the criteria in the 1951 Convention definition, UNHCR recognizes as refugees, those who are:

outside their country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life,

17 □ *Id.* at para. 3.

18 □ See, for example, UNHCR, *Climate change, natural disasters and human displacement: a UNHCR perspective* (23 October 2008) accessed at <http://www.unhcr.org/refworld/pdfid/492bb6b92.pdf> (14 January 2015).

19 □ See, for example, ECOSOC Resolutions 1655(LII) (1 June 1972), 1705(LII) (27 July 1972), 1741(LIV) (4 May 1973), 1799(LV) (30 July 1973), and 1877(LVII) (16 July 1974).

20 □ UNGA Res. 58/177 (22 December 2003).

physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.

The group of persons who may be refugees under UNHCR's international protection mandate is similar to those categories covered by the refugee definitions incorporated in regional refugee instruments, which provide for broadened definitions of what is a refugee to address the specific protection problems of the African and Latin American regions. It is important that eligibility staff in countries which apply these definitions are familiar with them.²¹

In other words, UNHCR's protection mandate is much broader than the narrow confines of some international instruments. UNHCR thus can, and should, at least in the short-term, conduct protection activities in favor of persons subjected to CCID.

Conclusion: Achieving Effective Solutions

From the above the discussion it may be concluded that existing international law combined with the UNHCR's expanded mandate provides a basic responsibility for protecting persons subject to CCID. Of course, clarifying the law would be valuable for providing certainty, but it also may come too late for the growing number of persons subjected to CCID today.

Finally, although we have shown how international refugee law can be interpreted to expand UNHCR's mandate, the role of international human rights law and international climate change should also be explored. As indicated above there are existing norms of international human rights law that provide obligations for States. Can these norms also be used to expand the activities of UNHCR or other international bodies in reviewing the protection of persons subjected to CCID?

Similarly, the UNFCCC provides that States must cooperate in adapting to climate change. This cooperation is to be governed by principles²² and commitments²³ that require developed States to provide assistance in the form of capacity building,²⁴ technology transfer,²⁵ and, in some cases, new and additional financing,²⁶ to developing States, from which most persons subject to CCID come. Can these obligations be used to ensure States cooperate with UNHCR to protect persons subjected to CCID?

These are questions that can be further explored in the context of using the existing law and mandates of UNHCR to protect persons subject to CCID.

21 □ UNHCR, *UNHCR Resettlement Handbook* 81 (Revised edition July 2011).

22 □ *See, supra*, note 9, at art. 3.

23 □ *Id.* at art. 4.

24 □ *Id.* at arts. 4(5) and 6.

25 □ *Id.* at art. 4(5).

26 □ *Id.* at art. 4(3) and (4).

