

Climate Refugees: A 21st Century Crisis - Sharmistha Michaels - The New Law Journal

13 DECEMBER 2021

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Is the law in place to protect people who are forcibly displaced by environmental disaster? **Sharmistha Michaels** discusses in her article for The New Law Journal

The world has warmed up by around 1.2°C since the 19th century. This has had a catastrophic effect on civilization: global sea levels reaching a record high; Greenland's enormous ice sheet melting faster than ever; floods deluging parts of Europe and China; and wildfires raging through forests and homes worldwide (see the World Meteorological Organization's report *State of Climate in 2021*).

Novels like John Lanchester's *The Wall* paint a dystopian picture of millions of people across the globe being displaced by climate change and seeking shelter. Britain's response is to

create a wall of its coastline to bar entry, in keeping with its post-Brexit anti-refugee attitude. Tales like his are no longer harbingers of a future dystopian crisis. The crisis is here *now*. Numbers affected are growing fast. By 2030, climate change could force 216 million people to migrate as hotspots of internal climate migration start to emerge (see the World Bank's 2021 *Groundswell* report).

So, the question is: are we doing enough to help those affected? Specifically, is the law in a position to protect people who are forcibly displaced by environmental disasters-'climate refugees'.

Defining a climate refugee

There is no current definition for a climate change 'refugee' or a 'displaced person'. This means that, unlike those fleeing persecution, there is no legal recognition for those fleeing climate-related disasters. Across the whole body of law, from international humanitarian law to human rights to refugee law, protections for climate refugees are limited and not legally binding. Yet it was recognised as long ago as the 1970s that there was a need to protect vulnerable groups displaced by climate change. But political inertia has arisen because of the knock-on effect that climate change imposes on other social, political and economic factors. This has led to a 'protection gap' between refugees whose asylum claims are catered for under existing legislation, and climate refugees who enjoy no such legal protection.

A refugee is defined in Art. 1(A)(s) of the 1951 Refugee Convention. Asylum can be claimed by such a person, according to its Art 1 A(2), on the basis of five grounds of persecution:

race,
religion,
nationality,
membership of a particular social group,
and political opinion.

This is the only framework available for anyone seeking asylum, and it ill suits the needs of climate refugees who struggle to fit the criteria. Climate refugees do not find themselves

displaced by persecution, but by the environment.

One difficulty lies in the 'persecution requirement' of the Convention. Currently, it relies on the actor of 'persecution' to originate from the territory where the displacement is occurring. The causes of climate crises do not always emanate from where an individual's safety or well-being are under threat. It is likely that the climate crisis disproportionately harms the poorest and most vulnerable who, without any legal protection, are likely to continue to suffer the worst effects of climate change.

Current Caselaw

The difficulty of meeting the needs of climate refugees within the Refugee Convention's rules is also evidenced in caselaw.

Seminal examples include those unsuccessful refugee applications made in Australia and New Zealand. Many of these applications were made by people living in low-lying island nations in the Pacific which are at particularly high risk of rising sea levels and general erosion. The case of Mr Ioane Teitiota and his family from Kiribati (*AF (Kiribati)* [2013] NZIPT 800413) highlights the plight of displaced persons. Mr Teitiota sought asylum under the Refugee Convention and Protected Persons jurisdiction, explaining that the effects of climate change at home (overcrowding, erosion, inundation and a lack of freshwater) plus rising sea levels had forced him to move to New Zealand.

His application was rejected by the Immigration and Protection Tribunal, and this decision was upheld on appeal. The stance taken by the New Zealand courts and the tribunal point to the strict requirements that must be met in order for a claimant to be recognised as a refugee. After exhausting his appeal rights, Mr Teitiota proceeded to the UN Human Rights Committee (UNHRC) where he argued that, by deporting him, the New Zealand courts had violated his right to life.

This led to a ground-breaking ruling by the UNHRC in January 2020. It stipulates that, even when climate-induced asylum seekers fail to meet the criteria for refugee protection, receiving countries must uphold human rights obligations. These require the receiving nation not to

deport or refoul them where returning them to their state of origin would lead to the violation of their right to life under Art 6 of the International Covenant on Civil and Political Rights (ICCPR). This decision, according to Kate Schuetze of Amnesty International, 'sets a global precedent' in affirming that any state which returns someone to a country where the climate crisis puts their life at risk, or in danger of cruel, inhuman or degrading treatment, would be in breach of its human rights obligations.

While UNHCR failed to endorse the term 'climate refugees', referring to them instead as 'persons displaced in the context of disasters and climate change', they conceded that there could be instances where such people may meet the criteria for asylum under the Refugee Convention. This would be the case where the adverse effects of climate change are compounded and interact with armed conflict or violence.

The importance of UNHRC's latest ruling is to bring climate conditions to the fore in triggering states' non-refoulement obligations under international human rights, refugee and humanitarian law. The requirements to meet Art 6 may remain high, but this ruling acts as an aide-memoire to states that climate change considerations must be included when evaluating refugee and asylum claims.

COP26

This year's extreme weather events formed the backdrop to the 26th Meeting of the Conference of Parties (COP26) in Glasgow. Its aim was to achieve global net-zero carbon emissions by mid-century and to keep global warming below the critical level of 1.5°C. Strategies include protecting communities and natural habitats, restoring ecosystems, protecting infrastructure and agriculture, and building defences. All these measures seek to avoid the loss of homes, livelihoods, and lives.

As debate about how to achieve these outcomes continues, criticism has come from the likes of Greta Thunberg who argues that the natural disasters of even the last year mean that only 'immediate and drastic' cuts in carbon emissions will have any impact. Talk of meeting net-zero pledges is tantamount to fiddling while Rome burns.

Only a concerted effort to reduce Co2 emissions globally can reduce the many problems presented by climate change, including the scale of climate migration. As people are forced to cross borders in the context of climate change and disasters, they may in some circumstances be in need of international protection. Some people are already living in climate hotspots. We must consider what legal protections these people need now and into the future to prevent them becoming victims of the law as it currently stands.

Governments could use various mechanisms to ensure that climate refugees receive protection. They could enshrine in their national law safeguards like legal status, as with refugees under the 1951 Convention. They could create humanitarian visas, planned relocation, and migration pathways.

A further step in the right direction might be to develop an alternative framework for those seeking climate-induced asylum. States would need to firstly acknowledge their non-refoulement obligations to such people. It may be the case that a minority of climate refugees are able to make successful asylum claims under the existing 1951 Convention. However, a guarantee of success might require a whole new legal text on climate refugees and migration. What is abundantly clear is that whatever option is adopted, further momentum, above and beyond the efforts of COP26, is urgently required for the needs of climate refugees to be met.

Conclusion

One devastating effect of climate change has been to create a fast-growing population of climate refugees. Refugee and human rights law have a crucial role to play in minimising their suffering. The definition of 'refugee' has not been expanded to include persons displaced by climate change, and there seems little political will to change this. This inaction will keep climate refugees outside of the protections of international refugee law—the only law available.

The case of Mr Teitiola highlights just how critical the effects of climate change and its land degradation must get before a climate asylum seeker like him qualifies under the ICCPR. Existing legislation is therefore inadequate to deal with the challenges posed by real and live environmental disasters and their effects on populations. Providing guaranteed legal protection for the growing number of individuals displaced by these disasters may well

necessitate an entirely new legal text dedicated to climate refugees and migration.

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