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Climate Change, Displacement and International Law: The Protection Gap and How to Close It

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Does International Law Provide Adequate Protections to Refugees? Climate Change, Displacement and International Law: The Protection Gap and How to Close It.

Climate change may well be the most pressing issue of our time; within only a few decades, the world will transform dramatically: some parts will slowly become uninhabitable, while the number of sudden-onset natural disasters is predicted to drastically increase (Bates 2002: 468; Kohlmanskog and Trebbi 2010: 714; Myers 2002: 609). These changes will have a significant impact on population movements (Williams 2008: 522). A widely cited number by Myers (2002: 609) predicts that by the year 2050 up to 200 million people may be displaced both internally and internationally. This essay will focus solely on those people who are displaced internationally, as the internally displaced are (at least in theory) still able to enjoy the protection of their state (Biermann and Boas 2012: 293). Firstly, it will demonstrate that despite the magnitude of the problem, internationally-displaced victims of climate change currently fall within a gap, as international law does not offer them protection (Docherty and Giannini 2009: 357; Hodgkinson et al. 2009: 159). In the second part, the question of whether international law is able to provide an adequate protection framework will be addressed. It will be demonstrated that international treaties or protocols could not address the issue adequately: first, by illustrating the problem of climate change-induced displacement; second, by analysing the current legal system; and third, by outlining the protection gap. Then, by examining three proposed options of reform, it will be shown that a better way of protection would be to establish regional soft laws^[1] with a view to creating binding regional treaties in the future. In the final section of the essay, the responsibilities for financing such a scheme will be outlined.

Climate change will have a profound impact on population movement, with rising sea levels, droughts, desertification and flooding set to displace millions of people (Sachs 2007: 43; Williams 2008: 502). Low-lying island states, as well as regions in Africa and Asia will be particularly affected (Docherty and Giannini 2009: 354; Sachs 2007: 43). One advantage is that the relative predictability of the crisis allows policy makers to find solutions before the events occur, which stands in contrast to more traditional patterns of population displacement (McAdam 2012: 7). Most internationally displaced will remain in their own regions, putting an additional strain on states already affected (Myers 2002: 609). Traditionally, those states that host displaced people have viewed the issue of human movement as either being voluntary (migrants) or forced (refugees); however, many displaced do not fall into these specific categories and lack legal protection (Betts 2010: 363-4). Persons fleeing due to climate change fall within this protection gap, as will be demonstrated shortly (Hodgkinson et al. 2009: 159; McAdam 2012: 1). It is important to note that climate change will rarely be the sole reason for flight, as it will exacerbate existing problems and may provide a "tipping point", but it will always interact with other reasons for displacement (Docherty and Giannini 2009: 359; McAdam 2012: 21). It is therefore difficult to label this class of people. While the term "environmental refugee" has existed since 1985 (El-Hinnawi 1985), labelling people as refugees has several problems: first, the term is sometimes rejected by those fleeing as it implies passivity and victimhood (McAdam 2012: 43); second, the term "refugee" as defined under the Refugee Convention may lose some of its significance if we label vast numbers of people as such; and third, traditional refugees have lost their state's protection, while people fleeing due to climate change may still enjoy it (Johnson 2009: 231; UNHCR 2012: 9). Therefore, the author of this essay will avoid the term climate change or environmental refugee and instead speak of the 'climate change displaced'.

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The problem of climate change-induced displacement is immense. More people are displaced annually by natural disasters than by conflict, and that number may rise up to 200 million within just a few decades (Myers 2002: 609). This is twenty times more than the number of people who are currently protected by UNHCR (Biermann and Boas 2012: 293), which gives an indication of the scale of the problem, even if the number of 200 million may be an exaggeration.[2] As Warner et al. (2010: 692) state, “environmentally induced migration has the potential to become a phenomenon of unprecedented scale and scope” and if we do not find a mechanism to deal with this, the issue may become unmanageable in the near future (Docherty and Giannini 2009: 354). Furthermore, with the advent of climate change-induced displacement, “a cycle is created where environmental degradation/disaster creates environmental refugees, who most frequently move to low-income, marginalized environments, causing further environmental degradation” (Johnson 2009: 242). As climate change is global in nature and humans have contributed and continue to contribute to its intensification, the international community should accept responsibility for mitigating climate change-induced displacement (Docherty and Giannini 2009: 349).

Neither refugee law nor climate change law protect those displaced by the effects of climate change (McAdam 2012: 1). While the 1951 UN Refugee Convention and its 1969 Protocol solely cover those “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (UN 1951), the UN Framework Convention on Climate Change (UNFCCC) only applies to state-to-state behaviour and does therefore not address the difficulty faced by the individual victims of climate change (Docherty and Giannini 2009: 358; Hodgkinson et al. 2009: 155). In addition to these international instruments, there are two regional texts relating to refugees that are worth examining. These are the Organisation of African Unity’s 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (hereafter “the OAU Convention”) and the 1984 Cartagena Declaration on Refugees governing the behaviour of Central American states, which can be classified as soft law (Biermann and Boas 2012: 294). Both instruments use definitions of refugees that are broader than that of the UN Refugee Convention (McAdam 2012: 48). While neither definition mentions the environment or climate change specifically, both may encompass the climate change displaced (Biermann and Boas 2012: 293; Warner et al. 2010: 694). However, even when people who have fled due to natural disasters and have fallen under the OAU Convention’s auspices, other reasons for protection were given by the host state, so that no precedent exists (McAdam 2012: 49). Those who have had to flee their state due to climate change are therefore currently not protected by international law.

Due to the scale of the issue and the fact that international law currently provides no protection for the climate change displaced, much has been written in recent years as to a future protection framework. Three categories of response have come out of this growing body of literature: the first option is to work within the existing legal refugee framework, which in effect would mean adding those displaced by climate change to the current legal system discussed above (Betts 2010: 377). The greatest problem with this approach is that the existing refugee regime is already overstretched and it is difficult to compel states to adhere to its principles (UNHCR 2012: 12). Despite the many hard and soft laws regulating the issue of refugees, the problem persists due to a lack of political will to assist even refugees that are already covered by the 1951 Refugee Convention (McAdam 2012: 199). Moreover, since the 1980s, governments in the global North have implemented restrictive practices towards asylum seekers (Gibney 2003: 19). This essay therefore focuses its attention on two different approaches, which may in the future protect the climate change displaced. First, it will introduce the proposal of drafting a new convention/protocol relating specifically to the status of those displaced due to climate change. However, as will be shown, several shortcomings make the establishment of a new convention/protocol both unlikely and undesirable. The third option will then be investigated, namely the creation of soft laws that may eventually lead to regional hard law treaties. Since this approach overcomes some of the obstacles of a new convention, it is currently the best option to protect vulnerable people who are internationally displaced due to climate change.

Several academics, such as Conisbee and Simms (2003: 39), Docherty and Giannini (2009: 350) and Hodgkinson et al. (2009: 160-162) have proposed the drafting of a new convention similar to the 1951 Refugee Convention, solely for the protection of those who are displaced by the effects of climate change. Others, such as Biermann and Boas (2012: 296) have proposed a protocol to the UNFCCC to the same effect. These scholars argue that a new convention/protocol is warranted due to the scale of the problem (Docherty and Giannini 2009: 350). Many of the proposals share similar ideas as to the nature of the new international legal instrument. Most scholars agree that it is

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important to consider groups of people rather than assess protection claims on a case-by-case basis (Biermann and Boas 2012: 294; Docherty and Giannini 2009: 350). Furthermore, much of the literature agrees that at the same time as protecting the victims of climate change, it is important to address the root causes of displacement, which would mean finding a way to deal with the increase of natural disasters (Docherty and Giannini 2009: 350; Hodgkinson et al. 2009: 162). Finally, the new convention/protocol would be assisted by the creation of a global fund solely for this purpose, as well as its own agency similar to UN High Commissioner of Refugees (UNHCR) (Biermann and Boas 2012: 297; Docherty and Giannini 2009: 384). However, disagreement exists as to the definition over who may be covered by the new instrument (Conisbee and Simms 2003: 39). Disagreements such as this present a considerable obstacle to the creation of such new international law.

While these proposals make an important contribution to the debate around the issue of climate change displacement, there are four problems with this approach. The central issue is that of a lack of political will. As discussed, many states have already implemented strict regulations for asylum seekers under the current refugee regime, which suffers from overstretch (UNHCR 2012: 12). Given the scale of the problem, many states are unwilling to agree to a new law that may open the “floodgates” to newly displaced persons (UNHCR 2012: 28). The second problem of the proposal for a new constitution/protocol relating to the climate change displaced is the complexity of the issue. As was shown above, climate change will rarely be the sole reason for flight and several factors that lead to displacement interact (Docherty and Giannini 2009: 359; McAdam 2012: 21). The question therefore arises of how states would determine that a person has fled due to climate change rather than economic or other factors (McAdam 2012: 187). A one-size fits all approach may therefore be unviable (McAdam 2012: 5). A third and related problem is the question of definition. As pointed out above, there is currently no agreed-upon definition describing the climate change displaced; talking about a new international law may mean “getting bogged down in definitional issues” rather than discussing substance (Johnson 2009: 222). Finally, as most displacement will occur regionally and every region will be affected differently (Myers 2002: 609), a single worldwide convention/protocol does not seem to be an optimal solution. For all these reasons, a different approach needs to be found that addresses the effects of climate change.

Therefore, while establishing new international law presents a great problem, putting into place an arrangement based on soft law can mitigate this. As former UN Representative on the Human Rights of Internally Displaced Persons (IDPs) Walter Kälin has pointed out, “it is much easier to negotiate with governments if the question of violations does not loom in the background, but instead, problems can be approached by looking at what kind of guidance is provided by international standards” (in Kohlmanskog and Trebbi 2010: 723). The 1998 Guiding Principles on Internal Displacement provide a good example for the drafting of soft law. Cohen and Deng (2008: 4) have said about the Principles that they were a good alternative to hard law, as first there was little political will to support a new treaty at the time and second, treaty writing takes years, but IDPs needed immediate protection. As the climate change displaced face similar problems, it seems viable to create a new instrument of soft law relating to the status of the climate change displaced similar to these Principles in regions where this category of people enjoys no protection (Kohlmanskog and Trebbi 2010: 718). In regions where hard and soft laws covering people fleeing due to climate change are already in place, such as in Central America (through the Cartagena Declaration) and Africa (through OAU Convention), states must be encouraged to use these instruments as a way to protect the climate changed displaced, which so far has not happened (McAdam 2012: 26).

New soft law instruments should be drafted regionally rather than internationally. When the climate change displaced leave their state, they will mostly remain within their region (McAdam 2012: 193). Scholars such as McAdam (2012: 211) and Williams (2008: 518) agree that regional arrangements may attain greater levels of commitment from participating states and are more flexible. Williams (2008: 521) suggests a “nonbinding ‘Memorandum of Understanding’ or ‘Plan of Action’ whereby states can discuss strategies and techniques for implementing regional initiatives”. While the African Union already has a binding instrument in the form of the OAU Convention, the European Union, the Organisation of American States, as well as the Association of Southeast Asian Nations (ASEAN) all present platforms for discussion for regional soft law instruments (Williams 2009: 520). New guidelines regarding the climate change displaced, based on refugee law, humanitarian law and human rights law may in the future become hard law (Shaffer and Pollack 2011: 1156). To draw again on the example of IDPs to illustrate this possibility, the Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention),

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drafted by the African Union in 2009, provides a case where a non-binding instrument (the Guiding Principles on Internal Displacement) used as the basis for creating a binding regional convention (iDMC 2012). The creation of soft law instruments with a view to drafting regional hard law agreements in the future presents several advantages over the drafting of an international legal convention/protocol, primarily the notion that they will meet less political resistance.

Creating and implementing soft law and regional treaties will be expensive, given the scope of climate change-induced displacement. The creation of a global fund has therefore been proposed by several scholars, such as Biermann and Boas (2012: 297), Docherty and Giannini (2009: 384) and Hodgkinson et al. (2009: 162). While this proposal seems to provide an excellent response to the issue, the question of who will finance such an approach needs to be addressed. Climate change has been exacerbated to a large extent through lifestyle choices made in developed states, mostly based in the global North, which have failed to reduce their greenhouse gas emissions (Biermann and Boas 2012: 295; McAdam 2012: 38). Conisbee and Simms (2003: 36) state:

Although most of the symptoms of environmental crisis appear in poorer countries, most of the causes lie in richer ones. This is particularly true of global warming and climate change, where the energy-intensive lifestyles enjoyed in the West generate high levels of carbon dioxide emissions, dramatically affecting weather patterns and sea levels ... The richer countries responsible should pay the cost of their own pollution.

As developed states bear most of the responsibility, they should cover the costs for the effects of climate change-induced displacement (Biermann and Boas 2012: 295; McAdam 2012: 38). Article 3 of the UNFCCC already recognises the responsibility of developed states: "the developed country Parties [to the convention] should take the lead in combating climate change and the adverse effects thereof" (UN 1992). Hodgkinson et al. (2009: 164) have put forward the idea of mandatory financial contributions based on emission levels and the capacity of states to pay. However, political will to create such an expensive enterprise will be difficult to gain and sustain (Biermann and Boas 2012: 295). On the other hand, states may choose to contribute to the fund, if the fund is being managed by an already existing organisation, such as the Global Environmental Facility, which is linked to the UNFCCC and already successfully manages several funds (Docherty and Giannini 2009: 385).

To sum up, those people who have had to flee their state due to the effects of climate change are currently not covered by international law. Neither the 1951 UN Refugee Convention and its Protocol offer protection, nor does the Climate Framework UNFCCC. While some regional instruments, such as the Cartagena Declaration and the OAU Convention, include the possibility to offer protection to the climate change displaced, they have never been used to do so. However, the issue is such a pressing one that solutions need to be found immediately. Much has therefore been written in recent years on the topic. One response, proposed by some scholars, is adding the climate change displaced to the 1951 Refugee Convention. However, this has been shown to be unsustainable. Other proposals suggest introducing a new convention or protocol in the form of international hard law. While having some merit, this approach presents several problems; the biggest obstacle is a lack of political will. As was demonstrated, a better way to close the current protection gap is to find regional solutions and create soft law, while not excluding the possibility of drafting regional hard law. This way, the central problem of a lack of political will can be mitigated to some extent. Unfortunately, even the approach proposed in this essay has considerable drawbacks; primarily the fact that it is still reactionary rather than preventive, but also that it would require considerable funding. States most responsible for climate change should bear this cost. Finally, while laws and policies are a good way to remove people from imminent or looming harm, it is important to find long-term and radical solutions that address the causes of climate change.

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[1] While hard law is legally binding, soft law is not; rather than establishing binding instruments, the role of soft law is to find consensus in order to implement nonbinding rules and regulations (Shaffer and Pollack 2011: 1150).

[2] For a discussion of the problems surrounding the prediction of a specific number of future displacements, see Jakobeit and Methmann 2012: 307.

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