

Australia: International Agreements as Obligation in the Case of Climate Change

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CHRIS FITZGERALD, MAR 20 2022

With human-induced climate change threatening humanity and mitigating and adapting to this threat requires a coordinated, global response from both developed and developing countries[1]. However, developed countries like Australia are high-emitting and bare the greatest responsibility for climate change and its effects, while developing countries, particularly the island states of the Pacific Ocean, have contributed the least to human-induced global warming. These low-emitting countries now face the most acute effects of climate change, particularly rising sea levels, increased salinity of agricultural land, and storm surges. The effects of climate change will likely result in large-scale forced migration from Pacific Island states in the coming decades, primarily to their larger neighbours in Australia and New Zealand. For these reasons, Australia, as a high per-capita emitter of carbon emissions and a prominent neighbour to Pacific Island countries, has an obligation to allow the orderly and safe migration of vulnerable Pacific Island populations suffering the acute effects of climate change in the coming decades. While there isn't any legal obligation currently under international law regarding accepting climate displaced peoples, Australia has obligations to aid its Pacific neighbours as a signatory of the 2015 Paris Agreement, through the doctrine of 'good neighbourliness' and through current and future legal challenges to both the definition of a refugee within the Convention Relating to the Status of Refugees (the Refugee Convention) and through non-refoulement in international law.

The United Nations Intergovernmental Panel on Climate Change (IPCC) recently released its sixth assessment report is a reminder of the challenge the international community faces with climate change. The report outlined five scenarios based on varying levels of emissions, ranging from global warming of between 3.6 and 4.4 degrees Celsius by the end of the century to between 1.5 and 2 degrees if the international community can effectively and quickly transition to net-zero emissions[2]. The planet is now already between 0.8 and 1.3 degrees warmer than in pre-industrial times and has already worsened temperature extremes. These climate extremes will become more intense, frequent, and appear in more locations with every fraction of a degree that the planet warms. Failure to address global warming is likely to result in long-term acute effects for humans, including drought, rising sea levels, storm surges, food insecurity, degradation of drinking water, and an increase in vector-borne diseases. While the international community is attempting to meet their international climate commitments, delays in adopting strong emissions reduction targets have ensured a level of guaranteed impact on the climate in the coming decades, and this will acutely affect developing countries[3]. The IPCC predicts that long-term environmental changes related to climate change will have an acute impact on migration flows, particularly the permanent migration of communities, which will form part of existing migration trends[4].

Developed states are largely responsible for the historical and current increase in emissions, including through extraction and exploitation of resources held by developing countries[5]. Harvey and Tremlett state that the top ten per cent of global emitters, who are also the wealthiest, contribute approximately 36 to 45 per cent of emissions, which is ten times the amount of the poorest ten per cent, who are responsible for only five per cent of emissions. Consumption is also higher in developed states, resulting in larger carbon footprints and these states dominate emissions in key sectors, such as transport and aviation[6]. Australia is one of these wealthy, high emitting states,

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and arguably bears a greater responsibility to address the effects of climate change, especially effects impacting their vulnerable Pacific neighbours. The United Nations Framework Convention on Climate Change supports this and recognises that states like Australia carry a responsibility for both, climate change, and, seeing to their capacity, simultaneously the implementation of solutions: such as lowering emissions, providing aid to vulnerable neighbours and potentially offering migration programs for temporary or permanent relocation[7].

In contrast, low emitting developing states are the most vulnerable to the effects of climate change. Some of the worst impacts will be in the Pacific, with Western Pacific Sea-levels rising faster than anywhere else in the world between 1993 and 2015. By 2050 they are expected to rise by an additional 0.10 to 0.25 metres, irrespective of a reduction in greenhouse gas emissions. By 2100, Pacific communities will experience extreme coastal impacts unless the world takes strong action to reduce emissions presently. For example, one in 100-year coastal inundation events will occur annually by 2100 at 20 per cent more locations under a high-emissions scenario. Additionally, many locations will face greater water scarcity due to saltwater intrusion from rising seas and higher rates of potential evaporation due to increased temperatures. For example, a 20 per cent decline in groundwater availability is projected by 2050 in the coral atoll islands of the Federal States of Micronesia (FSM). If sea levels rise as predicted, the availability of fresh groundwater in FSM could decline by more than half due to ocean water intrusion and drought events[8]. Pacific Island states are already vulnerable to severe weather events, including tropical cyclones, volcanic activity, earthquakes, droughts, and flooding. This is evident in the fact that both the Asian Development Bank and the International Monetary Fund acknowledge that Pacific Island states face the highest disaster risk of any region when measured per capita on total life-years lost as well as economic impact[9]. According to Lewis, this has justice implications for Australia as a high emitter of emissions to aid its vulnerable Pacific neighbours that will likely need to relocate large portions of their populations in the coming decades[10].

The Paris Agreement, ratified by 153 countries including Australia, seeks 'ambitious efforts' from the international community to keep global warming to 1.5 degrees celsius. As a signatory, Australia pledged to reduce greenhouse gas emissions by 26-28 per cent of 2005 levels by 2030[11]. The Paris Agreement is important in Australia's obligations regarding its vulnerable Pacific neighbours in two ways, the first being through the agreements 'global goal on adaptation' to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change[12]. The agreement outlines that while states should ensure their own domestic emissions reductions and adaptation efforts, developed states should also strengthen cooperation where the needs of developing states are considered[13]. For example, Article 9 requests parties both recognise the specific needs and special circumstances of developing countries, especially those that are particularly vulnerable to the adverse effects of climate change, and take full account of the specific needs and special situations of the least developed countries regarding funding and transfer of technology[14]. This suggests that a developed state in Australia is required to cooperate with developing states in the Pacific through providing funding as well as technological support to ensure that adaptive capacity is increased while vulnerability to the effects of climate change is reduced.

Article 8 of the Paris Agreement refers to loss and damage which is defined as harms that cannot be prevented through mitigation or adaptation and stands as manifestation of the impacts of climate change which affect natural and human systems[15]. Loss and damage is particularly relevant to Pacific Island states as it includes impacts like extreme weather events, including storm surges and flooding. Article 8 requests parties 'recognize the importance of averting, minimising and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage'. This includes the obligations to cooperate, act and offer support to slow onset events, ensure emergency preparedness, and support events that involve irreversible and permanent loss and damage[16]. Sands states that it is significant that the Paris Agreement recognised loss and damage for the first time, and that developing countries, particularly small island states, had long advocated for formal recognition of loss and damage. This reveals that the Paris Agreement has clear obligations for developed states to cooperate and help developing countries through financing mechanisms and the development and sharing of new technology to help developing states address the impacts of climate change[17]. McAdam and Pryke summarise this argument by stating that while Australia can't prevent future displacement completely, it can implement policies now that would help reduce its future scale, through mitigation, adaptation, and disaster risk reduction in conjunction with migration programs. This would reduce the risk of future displacement and reduce the economic, social, and human costs and suffering of

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Pacific Island populations[18].

The categorisation of a legitimate refugee in the Refugee Convention has been long-standing and strict, with a refugee defined as a person who is unable or unwilling to return to their country of origin due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion[19]. However, the Refugee Convention is increasingly being challenged by the modern realities of climate change increasing the likelihood of displacement to environmental disaster. McBeth argues that climate-displaced persons are in no less need than others who can seek asylum under the Refugee Convention and are at as great a risk of human rights violations[20]. The dilemma with Pacific Island states is that the effects of climate change are predicted to be gradual and slow onset, such as sea-level rise and erosion, and this doesn't necessarily reflect the Refugee Convention's depiction of a person fleeing persecution from their country of origin. Further complicating the matter is that these states, with cooperation from neighbours such as Australia, will have the opportunity to plan and implement adaptive responses in preparation for these slow-onset effects[21].

However, the Refugee Convention could incorporate people affected by climate change as refugees based in two ways. The first is that while international law would only define someone as stateless if their state ceased to exist, these islands are predicted to become uninhabitable long before they are submerged by rising sea levels, due to saltwater intrusion for example. For this reason, the statelessness mechanism of the Refugee Convention would not be able to adequately protect people in this situation in a timely manner and not provide them with their needs and human rights[22]. A good example of this is case 0907346 in the Australian Refugee Review Tribunal, where the appellant argued that he could be defined as a member of a particular social group in Kiribati that was distinct from the general population because they were acutely affected by rising sea levels and salination compared to the rest of the island. While the tribunal did not find in the appellant's favour, it does suggest that the Refugee Convention does not currently address the plight of people who may be displaced by climate change and that there may be room for future appellants to convey similar arguments within the Refugee Convention with more success, due to the worsening effects of climate change in the Pacific[23]. The second argument is the principle of non-refoulement, which ensures that those who meet the requirements for refugee status under the Refugee Convention cannot be sent back to their country of origin[24]. In the context of Australia, these obligations are partially reflected in Australia's complementary protection provisions in the Migration Act 1958 (cth)[25]. An excellent example of this is a finding by the United Nations Human Rights Committee in 2019, where the committee found that it was unlawful for governments to send people back to countries where climate change impacts expose persons to life-threatening risks. The matter concerned New Zealand's attempts to deport a Kiribati national, where he claimed that his life was increasingly threatened by erosion, inundation, and a lack of freshwater. While the committee is not legally binding, it effectively put governments on notice that their national laws should enable people to claim, and receive, protection from the impacts of disasters and climate change, or to allow them to move out of harm's way[26].

The principle of 'good neighbourliness' in international law is where states are encouraged to cooperate to promote friendly relations and capitalise on mutually beneficial relations with geographical neighbours. This is expressed in the preamble of the United Nations Charter and reflected in the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States. While this doctrine was initially designed for states that shared territorial boundaries, it has been expanded to encompass neighbourliness in regions and this neatly ties into the relationship between Australia and its Pacific Island neighbours. While Lewis states that, much like the Refugee Convention, it is difficult to apply this doctrine in the context of climate change because of its cumulative nature, it could obligate Australia to assist vulnerable islands in the Pacific. This would constitute an expansion of the traditional approach to good neighbourliness but would require Australia to plan for the migration of displaced peoples from Pacific Island states to ensure that any impacts of mass relocation are minimised in advance[27]. While the addressing of climate change through the doctrine of good neighbourliness has yet to be applied by any international body, humanitarian, economic and political factors for both Australia and Pacific Island states should dictate that Australia needs to act in good faith as a good neighbour in order to aid the adaption and mitigation of climate change in the Pacific and ensure that there are migration pathways available for Pacific Island states to aid the orderly movement of people during displacement events.

Pacific Island states are already experiencing the effects of climate change while also being the least responsible for

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it compared to high-emitting developed states, including Australia. While there currently aren't any legally binding obligations under international law for developed states to provide migration pathways for displaced regional populations affected by climate change, Australia arguably has an obligation both under the doctrine of good neighbourliness and as a signatory to the Paris Agreement to provide financial aid and technology for adaptation, and migration pathways for the climate displaced in the Pacific[28]. Furthermore, while the Refugee Convention doesn't currently include avenues for climate-displaced persons to seek asylum, numerous cases have and will be heard in the Australian courts relating to peoples of Pacific Island states seeking protection in Australia as climate-displaced refugees. This offers opportunities for court decisions to alter the definition of a refugee to consider climate change and natural disasters in refugee applications. This provides Australia, as a regional leader, with an opportunity to proactively implement policies that will enable orderly climate-induced migration from their vulnerable Pacific neighbours, and this is the morally correct and mutually beneficial course of action for Australia to take.

[1] Donald Rothwell, Stuart Kaye, Afshin Akhtar-Khavari, Ruth Davis and Imogen Saunders, *International Law: Cases and materials with Australian perspectives* (Cambridge University Press, 3rd Edition, 2018), 610.

[2] Kate Lyons, *IPCC report shows 'possible loss of entire countries within the century'* (The Guardian, 2021) 1.

[3] Philippe Sands, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018) 296.

[4] Bridget Lewis, *Neighbourliness and Australia's contribution to regional migration strategies for climate displacement in the pacific* (Queensland University of Technology Law Review, 2015) 10.

[5] Nikola Casule and Genevieve Jive, *To Mano O Te Moana: The state of the climate in the pacific 2021* (Greenpeace, 2021) 2.

[6] Fiona Harvey and Giles Tremlett, Giles, *Greenhouse gas emissions must peak within 4 years, says leaked UN report* (The Guardian, 2021) 1.

[7] Bridget Lewis, *Neighbourliness and Australia's contribution to regional migration strategies for climate displacement in the pacific* (Queensland University of Technology Law Review, 2015) 93.

[8] Mark Howden and Morgan Wairu, *The world could hit 1.5C warming in a decade. That's terrible news for the Pacific* (The Guardian, 2021) 1.

[9] Jane McAdam and Johnathan Pryke, *Climate Change, Disasters and Mobility: A Roadmap for Australian Action* (Kaldor Centre for International Refugee Law, 2020) 1.

[10] Bridget Lewis, *Neighbourliness and Australia's contribution to regional migration strategies for climate displacement in the pacific* (Queensland University of Technology Law Review, 2015) 93.

[11] Donald Rothwell, Stuart Kaye, Afshin Akhtar-Khavari, Ruth Davis and Imogen Saunders, *International Law: Cases and materials with Australian perspectives* (Cambridge University Press, 3rd Edition, 2018), 610.

[12] Philippe Sands, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018) 325.

[13] Ibid, 325.

[14] Paris Agreement, opened for signature 22 April 2016, (2016) ATS 24 (entered into force 4 November 2016).

[15] Philippe Sands, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018)

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[16] Paris Agreement, opened for signature 22 April 2016, (2016) ATS 24 (entered into force 4 November 2016).

[17] Donald Rothwell, Stuart Kaye, Afshin Akhtar-Khavari, Ruth Davis and Imogen Saunders, *International Law: Cases and materials with Australian perspectives* (Cambridge University Press, 3rd Edition, 2018), 610.

[18] Jane McAdam and Johnathan Pryke, *Climate Change, Disasters and Mobility: A Roadmap for Australian Action* (Kaldor Centre for International Refugee Law, 2020) 1.

[19] Thea Philip, *Climate Change Displacement and Migration: An analysis of the current international legal regimes deficiency, proposed solutions and a way forward for Australia* (Melbourne Journal of International Law, 2018) 9.

[20] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2nd Edition, 2017) 518.

[21] Thea Philip, *Climate Change Displacement and Migration: An analysis of the current international legal regimes deficiency, proposed solutions and a way forward for Australia* (Melbourne Journal of International Law, 2018) 8.

[22] *Ibid*, 11.

[23] *Ibid*, 9.

[24] Lea Merone and Peter Tait, *Climate refugees: Is it time to legally acknowledge those displaced by climate disruption?* (Australian and New Zealand Journal of Public Health, 2018) 2.

[25] Jane McAdam and Johnathan Pryke, *Climate Change, Disasters and Mobility: A Roadmap for Australian Action* (Kaldor Centre for International Refugee Law, 2020) 7.

[26] Lea Merone and Peter Tait, *Climate refugees: Is it time to legally acknowledge those displaced by climate disruption?* (Australian and New Zealand Journal of Public Health, 2018) 8.

[27] Bridget Lewis, *Neighbourliness and Australia's contribution to regional migration strategies for climate displacement in the pacific* (Queensland University of Technology Law Review, 2015) 100.

[28] Jillian Ash and Jillian Campbell, *Climate change and migration: the case of the Pacific Islands and Australia* (The Journal of Pacific Studies, 2016) 101.

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