

## CLIMATE CHANGE DISPLACEMENT AND INTERNATIONAL LAW

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Movement in response to environmental and climate change is a normal human adaptation strategy. The difficulty today is that people cannot simply migrate as and when they choose: national immigration laws restrict the entry of non-citizens into other countries. International law only recognizes a very small class of forced migrants as people whom other countries have an obligation to protect: 'refugees', 'stateless persons', and those eligible for complementary protection, discussed below. This means that unless people fall within one of those groups, or can lawfully migrate for reasons such as employment, family and education, then they run the risk of interdiction, expulsion and detention if they attempt to cross an international border and have no legal entitlement to stay in that other country.

### 1 Are people climate change 'refugees'?

The term 'refugee' is a legal term of art. The legal definition of a 'refugee', and the rights and entitlements which a refugee is owed, are set out in the 1951 Refugee Convention relating to the Status of Refugees, read in conjunction with its 1967 Protocol. A 'refugee' is defined as someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>1</sup>

First, the refugee definition only applies to people who have already crossed an international border. As noted above, much of the anticipated movement in response to climate change will be internal, and thus will not meet this preliminary requirement.

Secondly, there are difficulties in characterizing 'climate change' as 'persecution'. 'Persecution' entails violations of human rights that are sufficiently serious, either

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<sup>1</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2), read in conjunction with Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

because of their inherent nature, or because of their repetition (for example, an accumulation of breaches which, individually, would not be so serious but which together constitute a severe violation).<sup>2</sup> It remains very much a question of degree and proportion. Whether something amounts to ‘persecution’ is assessed according to the nature of the right at risk, the nature and severity of the restriction, and the likelihood of the restriction eventuating in the individual case.<sup>3</sup>

Although adverse climate impacts such as rising sea-levels, salination, and increases in the frequency and severity of extreme weather events (eg storms, cyclones, floods) are harmful, they do not meet the threshold of ‘persecution’ as this is currently understood in law. Part of the problem in the climate change context is identifying a ‘persecutor’. For example, the governments of Kiribati and Tuvalu are not responsible for climate change as a whole, nor are they developing policies which increase its negative impacts on particular sectors of the population. One might argue that the ‘persecutor’ in such a case is the ‘international community’, and industrialized countries in particular, whose failure to cut greenhouse gas emissions has led to the predicament now being faced.<sup>4</sup> These are the very countries to which movement might be sought if the land becomes unsustainable. This is a complete reversal of the traditional refugee paradigm: whereas Convention refugees flee their own government (or private actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from—yet within—countries that have contributed to climate change. This presents yet another problem in terms of the legal definition of ‘refugee’: in the case of Tuvalu and Kiribati, the government remains *able* and *willing* to protect its citizens.

Finally, even if the impacts of climate change could be characterized as ‘persecution’, the Refugee Convention requires such persecution to be *on account of* an individual’s race, religion, nationality, political opinion, or membership of a particular social group. Persecution alone is not enough. The difficulty here is that the impacts of climate change are largely indiscriminate, rather than tied to particular characteristics such as a person’s background or beliefs. Although climate change more adversely affects some countries, by virtue of their geography and resources, the reason it does is not premised on the nationality or race of their inhabitants. An argument that people affected by its impacts could constitute a ‘particular social group’ would be difficult to establish, because the law

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<sup>2</sup> See also Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, art 9. It may include a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: Migration Act 1958 (Cth), s 91R(2) (Australia).

<sup>3</sup> See GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press, Oxford, 2007) 92.

<sup>4</sup> See Intergovernmental Panel on Climate Change, *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (Cambridge University Press, New York, 1990) 8 (fn omitted); Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report: Summary for Policymakers* (2007) 5, 6, 12, 13.

requires that the group must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.<sup>5</sup>

So far, there have been a small number of cases in Australia and New Zealand where people from Tuvalu and Kiribati have sought to argue they should receive refugee protection from climate change impacts.<sup>6</sup> They have all failed.

Two case examples illustrate the reasoning. In New Zealand, the Refugee Status Appeals authority explained:

This is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide.<sup>7</sup>

In Australia, the Refugee Review Tribunal stated:

In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required. ... There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion.<sup>8</sup>

Nonetheless, there remain limited exceptions where exposure to climate impacts or environmental degradation might amount to persecution for a Convention reason. One example would be where government policies target particular groups reliant on

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<sup>5</sup> Goodwin-Gill and McAdam, *op cit*, 79–80; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (Dawson J). Note also the UNHRC discussion of ‘hunger refugees’ (First session of the Human Rights Advisory Council). Even if this test could be met by certain people displaced by climate change, the difficulty would remain in establishing ‘persecution’ in the context of climate-induced displacement.

<sup>6</sup> NZ cases: *Refugee Appeal No 72189/2000*, RSAA (17 August 2000); *Refugee Appeal No 72179/2000*, RSAA (31 August 2000); *Refugee Appeal No 72185/2000*, RSAA (10 August 2000); *Refugee Appeal No 72186/2000*, RSAA (10 August 2000); *Refugee Appeal No 72313/2000*, RSAA (19 October 2000); *Refugee Appeal No 72314/2000*, RSAA (19 October 2000); *Refugee Appeal No 72315/2000*, RSAA (19 October 2000); *Refugee Appeal No 72316/2000*, RSAA (19 October 2000); *Refugee Appeal No 72719/2001*, RSAA (17 September 2001). Australian cases: 0907346 [2009] RRTA 1168 (10 December 2010); N00/34089 [2000] RRTA 1052 (17 November 2000); N95/09386 [1996] RRTA 3191 (7 November 1996); N96/10806 [1996] RRTA 3195 (7 November 1996); N99/30231 [2000] RRTA 17 (10 January 2000); V94/02840 [1995] RRTA 2383 (23 October 1995).

<sup>7</sup> *Refugee Appeal No 72189/2000*, NZ Refugee Status Appeals Authority (17 Aug 2000) para 13.

<sup>8</sup> 0907346 [2009] RRTA 1168 (10 Dec 2009) para 51 (Australian Refugee Review Tribunal).

agriculture for survival, where climate change is already hampering their subsistence. Another example would be if a government induced famine by destroying crops or poisoning water, or contributed to environmental destruction by polluting the land and/or water.<sup>9</sup> However, in most cases people displaced by climate change are unlikely to gain protection as refugees.

## 2 How does human rights law apply?

Climate change may impact on a number of human rights:

Effects	Examples of rights affected
Extreme weather events	Right to life <sup>10</sup>
Increased food insecurity and risk of hunger	Right to adequate food, right to be free from hunger <sup>11</sup>
Increased water stress	Right to safe drinking water <sup>12</sup>
Stress on health status	Right to the highest attainable standard of health <sup>13</sup>
Sea-level rise and flooding	Right to adequate housing <sup>14</sup>

However, only a handful of human rights principles are presently recognized as giving rise to a protection obligation on the part of a receiving country. Human rights law has expanded countries' protection obligations beyond the 'refugee' category, to include people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This is known in international law as 'complementary

<sup>9</sup> *SERAC and CESR v Nigeria, Decision regarding Communication No 155/96*, ACHPR/COMM/A044/1, 15<sup>th</sup> Annual Activity Report of African Commission on Human and Peoples' Rights (7 May 2002), annex V, para 44. Cooper argues that desertification in the African Sahel and the nuclear explosion at Chernobyl constituted persecution: see JB Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 *NYU Environmental Law Journal* 480.

<sup>10</sup> International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'), art 5; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ('CRC'), art 6; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) ('UDHR'), art 3.

<sup>11</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ('ICESCR'), art 11; CRC art 24(c); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, opened for signature 30 March 2007) UNGA res 61/106 ('CRPD') arts. 25(f), 28(1); UDHR, art 25.

<sup>12</sup> ICESCR, arts 11,12; *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December 1979, entered into force 3 September 1981) GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46 ('CEDAW'), art 14(2)(h); CRPD, art 28(2)(a); CRC, art 24(2)(c).

<sup>13</sup> ICESCR, arts 7(b), 10, 12; CEDAW, arts 12, 14(2)(b); UDHR art 25; *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 ('CERD'), art 5(e)(iv); CRC, art 24; CRPD, arts 16(4), 22(2), 25; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNGA Res 45/158 of 18 December 1990 ('Migrant Workers Convention'), arts 43(1), 45(1)(c), 70.

<sup>14</sup> ICESCR, art 11; CERD, art 5(e)(iii); CEDAW, art 14(2)(h); CRC, art 27(3); Migrant Workers Convention, art 43(1)(d); CRPD, arts 9(1)(a), 28(1), 28(2)(d); UDHR, art 25(1).

protection’, because it describes human rights-based protection that is complementary to that provided by the 1951 Refugee Convention.

Although, in theory, any human rights violation could give rise to a *non-refoulement* obligation,<sup>15</sup> in most cases ‘it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach’ of a human right.<sup>16</sup> This is because unlike the absolute prohibition on returning someone to inhuman or degrading treatment, most other human rights provisions permit a balancing test between the interests of the individual and the State, thus placing protection from *refoulement* out of reach in all but the most exceptional cases.

While it may be therefore attempted to re-characterize the violated human right—for example, violation of the right to an adequate standard of living—as a form of inhuman treatment, which *is* a right giving rise to international protection, it is doubtful whether such violations which are not inflicted by the State being fled will be seen as giving rise to protection, or be regarded as constituting the kind of ill-treatment recognized to date as giving rise to a protection obligation on the part of a third State.<sup>17</sup> Courts have carefully circumscribed the meaning of ‘inhuman or degrading treatment’ so that it cannot be used as a remedy for general poverty, unemployment, or lack of resources or medical care except in the most exceptional circumstances.<sup>18</sup>

Although existing jurisprudence does not *preclude* climate impacts from being recognized as a source of inhuman treatment (for example), it would need to be substantially developed before such harms would fall clearly within the scope of this concept.<sup>19</sup> Furthermore, for policy reasons (such as to prevent ‘floodgates’ opening) some domestic complementary protection schemes deliberately ‘carve out’ protection exceptions where the risk is faced generally by the population as a whole, requiring the applicant to show an individual risk.

Further, the traditional western approach of individualized decision-making about protection on technical legal grounds seems highly inappropriate to the situation of climate-induced displacement, in which the responsibility for displacement is highly diffuse (attributable to a large number of polluting States over many years, rather than to direct ill-treatment of a particular person by a certain government) and the numbers of

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<sup>15</sup> *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26, paras 24–25 (Lord Bingham), 49–50 (Lord Steyn), 67 (Lord Carswell).

<sup>16</sup> *Kacaj v Secretary of State for the Home Department* [2002] EWCA Civ 314, para 26.

<sup>17</sup> *R v. Special Adjudicator ex parte Ullah* [2004] UKHL 26; Human Rights Committee, ‘General Comment 15: The Position of Aliens under the Covenant’ (11 April 1986), para 5; see also Human Rights Committee, ‘General Comment 18: Non-Discrimination’ (10 November 1989).

<sup>18</sup> *D v. United Kingdom* (1997) 24 EHRR 423; *N v. Secretary of State for the Home Department* [2005] UKHL 31; *HLR v. France* (1997) 20 EHRR 29, para 42; see also the views of Committee against Torture, as in *AD v. The Netherlands*, Communication No. 96/1997 (24 January 2000), UN Doc. CAT/C/23/D/96/1997, para 7.2. See discussion in Goodwin-Gill and McAdam, *op cit*, 350–51.

<sup>19</sup> *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26; Human Rights Committee, ‘General Comment 15: The Position of Aliens under the Covenant’ (11 April 1986), para 5; see also Human Rights Committee, ‘General Comment 18: Non-Discrimination’ (10 November 1989).

those displaced may require group-based rather than individualized solutions. Additionally, unlike traditional protection, which responds to flight from harm that is inflicted or sanctioned by the home State, protection sought for climate-induced displacement is the inverse: people may demand protection *in* industrialized States precisely because they are seen to have a responsibility to assist those who have suffered as a result of their emissions over time.<sup>20</sup>

### 3 Will people be ‘stateless’?<sup>21</sup>

There has been considerable media attention given to the so-called ‘disappearing States’ or ‘sinking islands’ phenomenon—whole countries that could be submerged by rising sea levels.<sup>22</sup> The science on rising sea levels was discussed in chapter one. The question arises whether inhabitants of such countries would be recognized as ‘stateless persons’ under international law if they had not acquired any other nationality (for example by moving to and becoming citizens of another country).

In international law, a ‘State’ exists if a defined territory has a permanent population, an effective government, and the capacity to enter into relations with other countries. The ‘disappearing islands’ rhetoric assumes that the loss of territory through submergence of land will signal the end of the country. Small island countries are, however, likely to become uninhabitable well before they physically disappear. This means that the absence of population, and with it, the loss of effective government, are likely to be the first signs that a country has started to ‘disappear’ as a legal entity.

However, the international law rules on the extinction of countries have never been tested in this way before. International law contemplates the formal dissolution of a country in cases of *absorption* (by another country), *merger* (with another country) and *dissolution* (with the emergence of successor countries).<sup>23</sup> It has never had to deal with the potential extinction of a country because of physical disappearance.

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<sup>20</sup> This is a variation on the argument made in the Inuit petition: Petition to the Inter American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States, 7 December 2005, available at: [http://www.earthjustice.org/library/legal\\_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf](http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf); see also S Byravan and S Chella Rajan, ‘Providing New Homes for Climate Change Exiles’ (2006) 6 *Climate Policy* 247.

<sup>21</sup> For a detailed analysis of this issue, see J McAdam, ‘“Disappearing States”, Statelessness and the Boundaries of International Law’ in J McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, Oxford, 2010).

<sup>22</sup> See eg J Bone and R Pagnamenta, ‘We Are Sinking, Say Islanders, But There Is Still Time to Save the World’, *The Times* (23 September 2009); R Callick, ‘Don’t Desert Us, Say Sinking Pacific Islands’, *The Australian* (30 July 2009); R Colville, ‘Vanishing Homelands’, *Bangkok Post* (7 February 2008); C Lambert, ‘That Sinking Feeling: What Would You Do If Your Country Was Disappearing under the Sea?’ *The Times* (18 March 2009); J Lateu, ‘That Sinking Feeling: Climate Refugees Receive Funds to Leave Islands’, *New Internationalist* (March 2008); N Schmidle, ‘Wanted: A New Home for My Country’, *The New York Times* (10 May 2009); C Sherborne, ‘Sinking Sandbanks’, *The Monthly* (March 2009).

<sup>23</sup> Succession can be described as a ‘change in sovereignty over territory’: MCR Craven, ‘The Problem of State Succession and the Identity of States under International Law’ (1998) 9 *European Journal of International Law* 142, 145.

The legal definition of a ‘stateless person’ in article 1 of the 1954 Convention relating to the Status of Stateless Persons is deliberately restricted to people who are ‘not considered as a national by any State under the operation of its law’.<sup>24</sup> In other words, this relates to a country that has actually denied or deprived someone of nationality.

As the 1954 statelessness treaty stands, it would not protect people whose country is at risk of disappearing, unless the country formally withdrew nationality from those people (which, as a matter of human rights law, it is obliged not to do). But if a country is no longer recognized as existing, then its former population would fall within the ‘stateless person’ definition, provided they had not acquired a new nationality in the meantime. This would oblige signatory countries to provide to such people within their territory the rights contained in that treaty, including ‘as far as possible facilitat[ing] the[ir] assimilation and naturalization’.<sup>25</sup>

The practical benefits of this remedy are limited, however. First, it remains unclear in international law when countries would be prepared to regard a pre-existing country as having ‘disappeared’. This is because history shows that the international community tends to presume the continuity of existing countries, even when some of the formal criteria of statehood start to wane. Secondly, relying on the statelessness treaty is reactive rather than proactive, because it is only ‘triggered’ once a person is physically present in the territory of another country. This means that people have to leave their homes and get to a signatory country before being able to claim its benefits. Finally, the treaty is very poorly ratified, and most countries do not have any formal procedures for determining the legal status of stateless persons. Thus, there is no clear means by which the treaty’s benefits could be accessed.

However, the advantage of the statelessness paradigm is that UNHCR has a mandate to prevent and reduce statelessness.<sup>26</sup> This means it is empowered to advocate on behalf of affected populations and talk to States about preventing statelessness and assisting

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<sup>24</sup> Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Convention), art 1(1): ‘For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.’

<sup>25</sup> 1954 Convention, art 32.

<sup>26</sup> See eg UNGA Res 50/152 (9 February 1996), reiterated in UNGA Res 61/137 (25 January 2007), UNGA Res 62/124 (24 January 2008), UNGA Res 63/148 (27 January 2009). See also Executive Committee of the High Commissioner’s Programme, ‘Statelessness: Prevention and Reduction of Statelessness and Protection of Stateless Persons’ (14 February 2006) UN Doc EC/57/SC/CRP.6, para 7. See also UNGA Res 50/152 (9 February 1996) paras 14–15; UNGA Res 3274 (XXIX) (10 December 1974); UNGA Res 31/36 (30 November 1976). UNHCR, supported by the International Organization for Migration and the Norwegian Refugee Council, ‘Climate Change and Statelessness: An Overview’ (Submission to the 6<sup>th</sup> Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC), 1–12 June 2009, Bonn) (19 May 2009) <<http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf>> 2.

stateless people.<sup>27</sup> By contrast, it has no mandate with respect to people displaced by climate change in other contexts, since they are not ‘refugees’.

#### **4 Conclusion**

Legal and policy responses must involve a combination of strategies, rather than an either/or approach. Physical adaptation needs to be financed and developed, and migration options, including opportunities for economic, family and educational migration, need to be accepted as a rational and normal adaptation strategy, rather than as a sign that adaptation has failed. While movement can be a sign of vulnerability, it can also be a means to achieve security and attain human rights, especially when it is able to be planned.

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<sup>27</sup> Though poorly ratified and implemented, the 1961 Convention on Reduction of Statelessness obliges States to ensure that any transfer of territory does not render people stateless: 1961 Convention, art 10. See also the ILC’s Draft Articles on Nationality, above n 91, art 1 of which contains a ‘right to nationality’; art 4 requires States to take measures to prevent statelessness as a consequence of succession.