

# Climate Refugees and International Law: Legal Frameworks and Proposals in the US and Abroad

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## I. Introduction

In recent years, the effects of a changing climate – from storm intensification to saltwater intrusion to desertification – have led to an increase in climate refugees, or environmental migrants, and renewed scholarship on the issue. A topic that was unheard of years ago, environmental migration has become one of the primary thrusts of environmental justice movements.<sup>1</sup> Advocates and scholars have developed an understanding of climate migration, potential legal frameworks, and likely effects. This discussion has reached a new level of intensity as advocates prepare for the UN Framework Convention on Climate Change Conference of Parties in Paris in December 2015.<sup>2</sup> In getting ready for this conference, new thoughts and ideas on climate refugees have emerged and are worth considering.

Environmental migrants or climate refugees are those who are forced to move and relocate based on changing climatic conditions. A commonly accepted definition is:

Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.<sup>3</sup>

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<sup>1</sup> See generally, Shaun McCullough, Note, *In a Rising Sea of Uncertainty: A Call for a New International Convention to Safeguard the Human Rights of Citizens of Deterritorialized Asia-Pacific Small Island-States*, 26 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 109, 120 (2015) (addressing climate migration is a fundamental responsibility of the international community); *Climate Campaign: Protecting People and Planet*, ENVTL. JUSTICE FOUND., <http://ejfoundation.org/campaign/climate>. (last visited Oct. 10, 2015); *Climate Justice and Migrant Rights*, NAT'L NETWORK FOR IMMIGRANT AND REFUGEE RTS., <http://www.nnirr.org/drupal/climate-justice-and-migrant-rights> (last visited Oct. 10, 2015).

<sup>2</sup> Erik Haites et al., *Possible Elements of a 2015 Legal Agreement on Climate Change*, 16 (Inst. for Sustainable Dev. and Int'l Rel., Working Paper No. 16, 2013).

<sup>3</sup> INT'L ORG. FOR MIGRATION, DISCUSSION NOTE: MIGRATION AND THE ENVIRONMENT 1–2 (2007).

Environmental migrants are those who relocate generally, while the term “climate refugee” has come to mean those who relocate *internationally* for the same or similar reasons.<sup>4</sup> These definitions have been made purposefully broad so as to include nearly all those who move for climate reasons, whether reactively or proactively.<sup>5</sup>

The debate about a legal framework has become increasingly relevant during recent years for three reasons. First, the effects of global climate change have only grown stronger, creating a mounting burden on local governments in affected areas and increasing the drive for people to move.<sup>6</sup> Second, the first of what could be numerous climate refugee cases has been adjudicated. In a recent case, the High Court of New Zealand rejected the refugee request of a citizen of Kiribati, holding that he had not shown he would be subject to sustained and systematic violations of his rights should he be forced to return.<sup>7</sup> These results, while not necessarily surprising, lead many environmental justice proponents to renew their calls for a legal framework to deal with climate migration. Finally, social pressures associated with climate change have placed a burden on the international community to deal with refugees moving for both climatic and sociopolitical reasons.<sup>8</sup>

These pressures have in turn lead to a large increase in scholarship and debate on legal frameworks to deal with climate migration. This paper will address three areas: (1) the existing regimes for environmental refugees, including the United Nations 1951 Convention relating to

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<sup>4</sup> Breanne Compton, Note, *The Rising Tide of Environmental Migrants: Our National Responsibilities*, 25 COLO. NAT. RES. ENERGY. & ENVTL L. REV. 357, 370 (2014).

<sup>5</sup> Jane McAdam, *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, 23 INT'L J. OF REFUGEE L. 2, 15 (2011).

<sup>6</sup> See McCullough, *supra* note 1, at 120 (explaining that current international law leaves significant gaps which therefore must be filled by regional or local governments, if at all).

<sup>7</sup> *Teitiota v. Chief Exec. of the Ministry of Bus. Innovation and Emp't* [2013] NZHC 3125 at [¶ 63], per J. Priestley (N.Z.) (Denying Teitiota's application for refugee status based on international climate change) [hereinafter *Teitiota*].

<sup>8</sup> E.g., Caitlin E. Werrell & Francesco Femia, CLIMATE CHANGE AS A THREAT MULTIPLIER: UNDERSTANDING THE BROADER NATURE OF THE RISK 2 (The Center for Climate and Security, 2015), [https://climateandsecurity.files.wordpress.com/2012/04/climate-change-as-threat-multiplier\\_understanding-the-broader-nature-of-the-risk\\_briefer-252.pdf](https://climateandsecurity.files.wordpress.com/2012/04/climate-change-as-threat-multiplier_understanding-the-broader-nature-of-the-risk_briefer-252.pdf).

the Status of Refugees and domestic policies; (2) proposals for new regimes relating to environmental refugees; and (3) potential effects of these proposed systems for environmental migrants.<sup>9</sup>

## **II. Current Regimes for Environmental Refugees**

### **A. The Geneva Convention Relating to the Status of Refugees**

The existing 1951 Geneva Convention Relating to the Status of Refugees (“UN Convention”)<sup>10</sup> has been the guiding framework controlling refugee migration in many countries.<sup>11</sup> The UN Convention created and operates under a specific definition of the term “refugee.” Under this Convention, in order to qualify as a refugee, a person must:

- (1) Demonstrate a well-founded fear of persecution on one of five protected grounds:  
race, religion, nationality, membership of a social group, or political opinion;
- (2) Be outside the country of former habitual residence;
- (3) And, be unable or, due to fear unwilling, to return to that country.<sup>12</sup>

While this framework has been used in refugee situations across the globe, the New Zealand case demonstrates the difficulties of applying the current refugee definitions to environmental migrants. First, it is difficult for an environmental migrant to identify a persecutor. Generally, as seen in the New Zealand case, the governments are attempting to help its citizens deal with climate change.<sup>13</sup> Furthermore, the New Zealand court specifically rejected the claim that through emitting climate change causing greenhouse gases the international community was a

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<sup>9</sup> See, e.g., McCullough, *supra* note 1, at 128–30; Compton, *supra* note 4, at 369–70; Xing-Yin Ni, Note, *A Nation Going Under: Legal Protection for “Climate Change Refugees”*, 38 B.C. INT’L & COMP. L REV. 329, 361–62 (2015).

<sup>10</sup> United Nations Convention Relating to the Status of Refugees art. 1(A)(2), July 27, 1951, 189 U.N.T.S. 2545 [hereinafter 189 U.N.T.S. 2545].

<sup>11</sup> See Ni, *supra* note 9, at 338 (using New Zealand as an example of one country which has adopted this framework).

<sup>12</sup> 189 U.N.T.S. 2545, *supra* note 10.

<sup>13</sup> See Ni, *supra* note 9, at 339 (noting that it is “unlikely that [environmental migrants’] home countries have abandoned them to the throes of climate change,” complicating the identification of a persecutor in an environmental refugee claim).

persecutor, holding that the international community did not do so with any motivation to harm climate-vulnerable states.<sup>14</sup> Additionally, the alleged persecution of climate migrants would not fit into one of the five protected grounds.<sup>15</sup>

As to the two final requirements of the UN Convention, this definition of the term refugee excludes many people who have fled the effects of climate change but have not actually moved out of their home country. These “internally displaced peoples” currently have no international doctrine of which to avail themselves.<sup>16</sup> While concerns about environmental and subsequent humanitarian conditions may lead a refugee to be unable or unwilling to return to his or her home country,<sup>17</sup> environmental migrants are still hampered in meeting the three other characteristics.

### **B. Current US Immigration Mechanisms for Environmental Refugees**

As discussed above, any international agreement would have a limited effect on the United States unless it is adopted and implemented at the national level. Furthermore, some have argued that even if the United States adopted an international regime, it would not be likely to have the full desired effect.<sup>18</sup> Some argue that for the United States to have any affect on the environmental migration situation, it would need to adopt its own protocol.<sup>19</sup> Without any legislative action, the United States has several methods of allowing increased environmental

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<sup>14</sup> See generally *Teitiota*, *supra* note 7; Ni, *supra* note 9, at 339.

<sup>15</sup> See *Teitiota v. Chief Exec. of the Ministry of Bus. Innovation and Emp't* [2015] NZSC 107 at [¶ 1]; Ni, *supra* note 9, at 340–41 (although the effects of climate change were a “sad reality,” [they] did not bring Teitiota’s experience within the scope of the refugee convention”).

<sup>16</sup> See Compton, *supra* note 4, at 370.

<sup>17</sup> See Ni, *supra* note 9, at 342–43 (explaining that while Teitiota raised humanitarian concerns causing him to wish not to return to Kiribati, his claim was “ultimately unconvincing”).

<sup>18</sup> Carey DeGenaro, Comment, *Looking Inward: Domestic Policy for Climate Change Refugees in The United States and Beyond*, 86 U. COLO. L. REV. 991, 1033 (2015) (noting that “because they do not sufficiently address domestic conditions and policies, the United States cannot rely on international treaties to solve this problem”).

<sup>19</sup> *Id.*

migration.<sup>20</sup> These include, but are not limited to: (1) temporary protected status granted by the Secretary of the Department of Homeland Security;<sup>21</sup> (2) prosecutorial discretion by the executive branch not to pursue cases against environmental migrants;<sup>22</sup> (3) parole granted by the Secretary of the Department of Homeland Security or executive branch allowing environmental migrants to remain in the United States;<sup>23</sup> and, (4) withholding of removal, preventing the return of an individual to another sovereign nation where they may be persecuted.<sup>24</sup>

The downsides of mechanisms such as granting parole is that they are largely temporary and not without various legal challenges.<sup>25</sup> Thus, at this point, environmental refugees are left with limited options in the United States.<sup>26</sup> Absent a legal claim to refugee status grounded in the existing UN Convention, climate refugees have only limited options in the United States for refugee or asylum claims. Moreover, measures like prosecutorial discretion are not without legal challenges. For example, in 2014 President Obama announced a program to use prosecutorial discretion to not prosecute individuals who had unlawfully migrated to the US as minors as well as undocumented parents of U.S. citizens and legal residents.<sup>27</sup> In just over a year, legal challenges to the use of prosecutorial discretion have arisen around the country, with courts

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<sup>20</sup>See *Id.* at 1016; Compton, *supra* note 4, at 375.

<sup>21</sup> DeGenaro, *supra* note 19, at 1016–18; Compton, *supra* note 4, at 376. [I think direct citations are more appropriate here]

<sup>22</sup> DeGenaro, *supra* note 19, at 1018–20; Compton, *supra* note 4, at 367 (explaining that prosecutorial discretion temporarily removes the refugee from the docket of removal proceedings but confers no legal status on the refugee). [same as above]

<sup>23</sup> DeGenaro, *supra* note 19, at 1020–21.

<sup>24</sup> *Id.* at 1021–22.

<sup>25</sup>See *Id.* at 1020 (“[P]arole suffers from many of the same downfalls as [temporary protected status] and prosecutorial discretion. Not only is it temporary, it is discretionary and does not confer on a beneficiary the same rights to which a lawful permanent resident or citizen would be entitled.”); Compton, *supra* note 4, at 376–77.

<sup>26</sup> Compton, *supra* note 4, at 377 (“no official recognition or affirmative immigration status for environmental refugees within the United States” at this point”).

<sup>27</sup> Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 60–61 (2015).

conflicted on the legality of deferred action.<sup>28</sup> Given that the Obama Administration’s use of prosecutorial discretion has currently been enjoined<sup>29</sup> pending an appeal to the Supreme Court, any attempt to expand it would need to overcome existing hurdles as well as likely novel challenges.

There is one final important characteristic of US immigration law to consider. The US (as well as other nations) could unilaterally change its definition of “refugee” to include climate refugees.<sup>30</sup> With or without the international community, the US could choose to allow climate refugees under its existing immigration framework. This option will become more viable if the movement toward an international framework continues to falter. Of course, this would likely require legislative action by Congress.<sup>31</sup> Senator Brian Schatz of Hawaii attempted to add a climate refugee amendment to a comprehensive immigration reform bill Congress considered in 2013.<sup>32</sup> This amendment would have allowed the Secretary of the Department of Homeland Security to designate certain climate refugees as stateless persons, thus entitling those persons to conditional lawful status while applying for permanent resident status.<sup>33</sup> However, Congress did not adopt this reform bill.<sup>34</sup> At this point, any further change in US policy on climate migration is unlikely<sup>35</sup>

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<sup>28</sup>See *id.* at 63–64 (illustrating challenges to the use of prosecutorial discretion in federal district courts around the country).

<sup>29</sup> *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015), *cert. granted*, (U.S. Jan. 19, 2016) (No. 15-674) (denying the federal government’s motion to stay a lower court’s injunction against the program of prosecutorial discretion).

<sup>30</sup> Compton, *supra* note 4, at 381.

<sup>31</sup> U.S. Const. art. 1, § 8, cl. 4.

<sup>32</sup> DeGenaro, *supra* note 19 at 1034.

<sup>33</sup> *Id.* at 1034–35.

<sup>34</sup> *Id.*

<sup>35</sup> See Michael D. Shear & Julia Preston, *In Courts, Running out the Clock on Obama Immigration Plan*, *The New York Times*, Oct. 14, 2015, at A1 (noting “years of fruitless battle . . . to pass a comprehensive overhaul of the nation’s immigration laws”).

### **III. Proposals for New Frameworks to Manage Environmental Migration**

#### **A. Updating the Current Definition of “Refugee” Within the Existing UN Framework to Include Environmental Refugees**

One proposal for creating a legal means to address environmental migrants has been to simply reform the current definition of “refugee” within the existing UN Convention and protocols. Proponents argue that environmental migration is already occurring and migrants have a right to a legal solution.<sup>36</sup> Proposals to redefine the term “refugee” have commonly suggested redefining or eliminating the persecution element as well as expanding or eliminating the protected grounds.<sup>37</sup> This proposal, while on its face straightforward, would drastically change the current refugee regime and would likely be quite controversial.

Another suggestion is to simply add environmental migrants as a class of people protected by the existing UN Convention.<sup>38</sup> While both of these proposals appear to be simple, scholars have already identified five points of contention.<sup>39</sup> What this shows is that even simply expanding the current definition is not free from dispute;<sup>40</sup> framing the debate as a simple issue of definitions, while perhaps the most straightforward option, is not without debate. At this point, the debate centers around: (1) the causes of relocation, (2) the permanence of relocation, (3) whether or not the relocation is international, (4) the influence of the environmental harm, and (5) the suddenness of the environmental harm.<sup>41</sup> This serves to illustrate the difficulty of enacting a comprehensive international definition to the existing UN Convention.

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<sup>36</sup> Compton, *supra* note 4, at 380.

<sup>37</sup> *See, e.g., Id.* at 381; DeGenaro, *supra* note 19 at 1029–30 (identifying proposals which suggest outlining rights of climate refugees or adding a environmental migrant definition as an amendment under the current UN Convention.).

<sup>38</sup> DeGenaro, *supra* note 19, at 1028.

<sup>39</sup> *Id.* (Proposals “[have] not settled the debate over who should be included” in a definition of environmental migrants).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1028–29.

## B. Adopting a New Comprehensive Legal Framework for Environmental Migrants

With the absence of consensus on adding environmental migrants to existing refugee frameworks, some have advocated for creating a new, comprehensive structure for environmental migration. This could potentially look like either an environmental migration protocol adopted by the UN Framework Convention on Climate Change or an entirely new and distinct United Nations protocol.<sup>42</sup> There are a number of characteristics common to these proposals. First, while it will be created at the international level, it will depend on the adoption and cooperation of sovereign nations.<sup>43</sup> Additionally, rights and definitions of environmental migrants must still be agreed upon.<sup>44</sup>

There are currently two main factors weighing against a new comprehensive framework for climate migration. First is the urgent threat of mass migration.<sup>45</sup> Some would argue that there is not enough time for the international community to debate and adopt an entirely new framework.<sup>46</sup> Secondly are previous attempts at multilateral environmental migration treaties. Both the Organization of African Unity<sup>47</sup> and the Cartagena Declaration<sup>48</sup> have adopted regional multilateral refugee agreements, which include catchall definitions environmental factors could be included under.<sup>49</sup> Nevertheless, there is not, at this point, any evidence of a climate or

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<sup>42</sup> *Id.* at 1030 (discussing potential amendments to the 1951 UN Convention or 1967 UN refugee Protocol, or a new, “top down” agreement).

<sup>43</sup> *E.g., Id.* at 1030–31 (“participation by individual sovereign nations . . . is essential to the development of a comprehensive legal regime”).

<sup>44</sup> *See Id.* at 1028–29 (current definitions have not “settled the debate over who should be included”).

<sup>45</sup> DeGenaro, *supra* note 19, at 998 (predicting “212 million climate migrants by 2050”).

<sup>46</sup> *See Id.* at 1032 (“An international, treaty-based system is likely unattainable in the near future, despite the imminent increase in substantial climate-based migration.”).

<sup>47</sup> Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1(2), Sept. 10, 1969, 1001 U.N.T.S. 45. (including “events seriously disturbing the public order” as valid reasons a refugee may be compelled to leave his or her home country)

<sup>48</sup> Organization of American States, Cartagena Declaration on Refugees in Latin America art. 3(3), Nov. 22, 1984 (including persons who fled their home due to disruptions to the public order within the term refugee).

<sup>49</sup> Ni, *supra* note 9, at 357.

environmental refugee claim being granted.<sup>50</sup> This shows that neither of the two most common proposals for dealing with climate migration offers, at this point, a clear solution.

#### **IV. Potential Effects of Adopting Either New Climate Migration Strategies**

Any environmental migration protocol is faced with one clear and potentially overwhelming issue: absent widespread acceptance on an international scale, it will have little effect.<sup>51</sup> This issue of efficacy is can be broadly divided into two categories: internationality and timing. Not only would an international framework have to be adopted by the countries party to it, these countries would also have to implement and uphold such an agreement. Arriving at an international agreement would be only a starting point, not a goal.<sup>52</sup> This fact raises real questions of whether or not any international agreement is the correct response. Given that in many instances climate migration occurs within a country's boundaries, an international environmental migration framework would be almost irrelevant without the adoption of domestic reforms within the involved states.<sup>53</sup>

Furthermore, the process of acceptance and implementation could take many years to complete. At this point, environmental migration and climate refugees are only one of many potential topics for discussion of a subpanel meeting at the December 2015, UN Framework Convention on Climate Change Conference of Parties in Paris.<sup>54</sup> Even if this subpanel reaches an agreement on environmental migration, their work would likely need to be “distilled into a mix

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<sup>50</sup> See Compton *supra* note 4 at 382, n.181 (noting absence of any recorded cases); *Teitiota supra* note 7, at ¶ 51 (holding that the millions of people suffering from the consequences of climate change are not, without legislative action, able to take advantage of the current refugee system).

<sup>51</sup> McAdam, *supra* note 5, at 2.

<sup>52</sup> See *id.* at 5 (rejecting the argument that an international treaty “will provide *the* answer to climate change-related displacement”).

<sup>53</sup> See, e.g., *id.* at 8 (“most movement will be internal, gradual, and not necessarily suited to an international treaty response.”).

<sup>54</sup> ÉRIK HAITES ET AL, WORKING PAPER 16: POSSIBLE ELEMENTS OF A 2015 LEGAL AGREEMENT ON CLIMATE CHANGE, 16 (Institute for Sustainable Development and International Relations, 2013) (listing areas this panel is supposed to address, including migration, adaptation, disaster risk reduction, loss of territory, and more).

of legal instruments,” such as one of the two previously discussed options.<sup>55</sup> This demonstrates just how far the international community is, in terms of time, from a new framework. For those living in areas currently struggling with various effects of global climate change, any framework could be too little, too late.

There is a second, more conceptual, effect that an environmental migration treaty could cause. A treaty focused on defining and implementing mechanisms regarding environmental migrations could promulgate the view that climate change causes migration in and of itself and not as one part of a variety of factors.<sup>56</sup> In reality climate change and socio-economic factors are often inextricably tied together as reasons people are displaced or migrate.<sup>57</sup> By potentially shifting the focus towards environmental migration entirely, there may be a focus on singling out one cause of movement, especially one that could be difficult to identify and prove.<sup>58</sup> Identifying climate change as a cause of migration may only focus on a cause without attempting to solve the problem.<sup>59</sup>

## V. Conclusion

With potentially millions of people migrating or seeking refugee status for climate related reasons in coming decades,<sup>60</sup> what has become clear is that the current regime for international refugee migration is inadequate.<sup>61</sup> It remains unclear what the best way forward would be,

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<sup>55</sup> *Id.* at 21 (“it is also possible that the final agreement may need to be distilled into a mix of legal instruments comprising for example, amendments. . . . [or] a new protocol, legal instrument or agreed outcome with legal force”).

<sup>56</sup> McAdam, *supra* note 5, at 12–13 (“It is conceptually problematic and empirically flawed in most cases to suggest that climate change alone *causes* migration.” Rather, it “exacerbate[s] existing socio-economic or environmental vulnerabilities.”).

<sup>57</sup> *Id.* at 13 (“[It is] practically impossible . . . to differentiate between . . . [victims] of climate change, and those who are victims ‘mere’ economic or environmental hardship.”).

<sup>58</sup> *Id.* at 14 (explaining concerns about focusing on climate change at the expense of various socio-economic factors).

<sup>59</sup> *Id.* at 17 (explaining that a “treaty-based solution” by itself does not solve the human rights concerns which arise from a multitude of sources in regions impacted by climate change).

<sup>60</sup> DeGenaro, *supra* note 19, at 998.

<sup>61</sup> *See*, McCullough, *supra* note 1, at 120.

whether on a US level or an international level. While there are current immigration mechanisms in the US that could be applied to climate refugees,<sup>62</sup> these all have pitfalls, which may make them inadequate as a long-term solution.<sup>63</sup> There are also international proposals, such as amending the existing Geneva Convention Relating to the Status of Refugees or enacting a new international protocol.<sup>64</sup> These too however are not free from controversy.<sup>65</sup> This leaves difficult yet pressing legal decision for domestic and international lawmakers to make. This area of climate justice deserves serious study and prompt attention.

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<sup>62</sup> See, e.g., DeGenaro, *supra* note 19, at 1016; Compton, *supra* note 4 at 375.

<sup>63</sup> DeGenaro, *supra* note 19, at 1021

<sup>64</sup> DeGenaro, *supra* note 19, at 1028, 1030.

<sup>65</sup> McAdam, *supra* note 5, at 2.