

On the Brink of a “Mass Exodus,” Can International Law Adequately Protect “Climate Refugees”?

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ABSTRACT

On February 14, 2023, United Nations Secretary-General Guterres launched a desperate call for the international community to mobilize and adopt urgent measures to tackle the climate emergency. Among the most pressing challenges, Mr. Guterres highlighted the risk of “a mass exodus of entire populations on a biblical scale,” adding, “[p]eople’s human rights do not disappear because their homes do . . . [y]es, this means international refugee law.” The dramatic warning was a legitimate reminder of the challenges posed by the consequences of climate change on displacement, but also of the critical question of the legal protection of the populations concerned. However, while the reference to refugee law is in keeping with the common terminology of “climate refugees,” it overlooks that the legal landscape in this area is complex and imperfect and has been the object of much controversy over the past decades. Yet, as climate change experts increasingly warn that the world is approaching a breaking point, the question feels less theoretical and more urgent: can international law offer answers to the prospect of mass displacement in relation to climate change? This paper provides a concise overview of the conversation, examining the variety of legal avenues available to “climate refugees” and what the most recent developments suggest about the future of international law in this area.

INTRODUCTION

On February 14, 2023, the United Nations (UN) Secretary-General António Guterres launched a desperate plea to address the climate crisis. He highlighted the risk of “a mass exodus of entire populations on a biblical scale.” Referring to islands and areas threatened by sea-level rise,¹ he added, “[p]eople’s human rights do not disappear because their homes do” before concluding, “[y]es, this means international refugee law.”² The dramatic warning felt reminiscent of another similarly memorable one:³ when, in 2021, Tuvalu’s Foreign Affairs Minister addressed the twenty-sixth Conference of the Parties to the UN Framework Convention on Climate Change in a video showing him speaking from a podium, wearing a suit, but standing in knee-high seawater.⁴

Low-lying nations are among the first victims of sea-level rise, one of the most conspicuous effects of climate change. In Tuvalu, rising sea levels already

1. Damian Carrington, *Rising Seas Threaten ‘Mass Exodus on a Biblical Scale’, UN Chief Warns*, THE GUARDIAN (Feb. 14, 2023), <https://www.theguardian.com/environment/2023/feb/14/rising-seas-threaten-mass-exodus-on-a-biblical-scale-un-chief-warns>.

2. *Id.*

3. Rahul Balasundaram & Ryan Plano, *UN Chief’s Dramatic Language on Climate Migration May Not Be the Help We Need*, CLIMATE REFUGEES (Mar. 22, 2023), <https://www.climate-refugees.org/spotlight/2023/3/21/risingseas>.

4. *Tuvalu Minister to Address Cop26 Knee Deep in Water to Highlight Climate Crisis and Sea Level Rise*, THE GUARDIAN (Nov. 8, 2021), <https://www.theguardian.com/environment/2021/nov/08/tuvalu-minister-to-address-cop26-knee-deep-in-seawater-to-highlight-climate-crisis>.

cause regular and severe flooding.⁵ Meanwhile, it threatens to drown the neighboring Marshall Islands altogether—affecting the nation’s very existence as a state and forcing up to 59,000 people to move.⁶ With nowhere to escape, these islanders will ultimately be forced to relocate abroad, becoming what is sometimes called “climate refugees.” For decades, islanders’ misfortune has been the most emblematic case of what is more accurately described as climate change-induced displacement: when individuals are forced to flee, not because of persecution or conflict but because the damages to their surrounding environment are so dire that remaining would jeopardize their livelihood or wellbeing.⁷ While the fate of these so-called “sinking” islands may seem far off to many, it is hard to find any coastal community worldwide not worried about the rising sea levels.⁸ In Europe, large parts of the Netherlands could be underwater by the end of the century or earlier.⁹ In New York, the ocean could swallow entire neighborhoods.¹⁰ Mumbai, Shanghai, Bangkok, and many other megalopoli face similar threats which would force millions to relocate.¹¹

Beyond sea-level rise, all over the world, individuals are already moving to escape the consequences of climate change.¹² This phenomenon will only worsen with time. The most alarming estimates claim as many as 1.2 billion people could be displaced by 2050.¹³ Though the chilling figure and its

5. Kyle Almond, *Rising Sea Levels are Threatening this Pacific Paradise*, CNN, <https://www.cnn.com/interactive/2019/05/world/tuvalu-climate-change-cnnphotos/> (last visited Feb 15, 2023).

6. *Adapting to Rising Sea Levels in Marshall Islands*, THE WORLD BANK (Oct. 22, 2021), <https://storymaps.arcgis.com/stories/8c715dcc5781421ebff46f35ef34a04d>.

7. Though there is a wide variety of terminology used in literature, this article will mostly use that of “climate change-induced displacement” interchangeably with “climate displacement”, even though a careful examination of either expression may reveal shortcomings, *see, e.g.*, INT’L ORG. FOR MIGRATION, ENVIRONMENTALLY-INDUCED POPULATION DISPLACEMENTS & ENVIRONMENTAL IMPACTS RESULTING FROM MASS MIGRATIONS (1996).

8. Karen McVeigh, *‘It’s Absolutely Guaranteed’: The Best & Worst Case Scenarios for Sea Level Rise*, THE GUARDIAN (Jun. 26, 2023), <https://www.theguardian.com/environment/2023/jun/26/its-absolutely-guaranteed-the-best-and-worst-case-scenarios-for-sea-level-rise>.

9. Naomi O’Leary, *When Will the Netherlands Disappear?*, POLITICO (Dec. 16, 2019), <https://www.politico.eu/article/when-will-the-netherlands-disappear-climate-change/>.

10. Julia Jacobo & Sam Suzuki, *How Rising Sea Levels Will Affect New York City, America’s Most Populous City*, ABC NEWS (Apr. 19, 2023), <https://abcnews.go.com/US/rising-sea-levels-affect-new-york-city-americas/story?id=98482167>.

11. Denise Lu & Christopher Flavelle, *Rising Seas Will Erase More Cities by 2050, New Research Shows*, THE NEW YORK TIMES (Oct. 29, 2019), <https://www.nytimes.com/interactive/2019/10/29/climate/coastal-cities-underwater.html>.

12. For data, *see, e.g.*, *Env’t Migration*, MIGRATION DATA PORTAL (Dec. 20, 2023), https://www.migrationdataportal.org/themes/environmental_migration_and_statistics.

13. Sean McAllister, *There Could Be 1.2 Billion Climate Refugees by 2050. Here’s What You Need to Know*, ZURICH.COM (2023), <https://www.zurich.com/media/magazine/2022/there-could-be-1-2-billion-climate-refugees-by-2050-here-s-what-you-need-to-know>; for a review of various estimates, *see* Simone Tagliapietra & Klaas Lenaerts, *Climate Migration: What Do We Really Know?*, BRUEGEL (Aug. 21, 2023), <https://www.bruegel.org/blog-post/climate-migration-what-do-we-really-know>.

apocalyptic flavor have drawn criticism,¹⁴ the fact that vast numbers of people will be affected is no longer controversial¹⁵—although the impact is uneven across the globe.¹⁶ While human mobility has always been affected by environmental factors, the nature and magnitude of climate change-induced displacement, as well as the anticipated humanitarian, legal, political, economic, and social consequences are unprecedented.¹⁷

Though they are often dubbed “climate refugees,”¹⁸ the expression has caused much controversy in the legal community since “refugee” refers to a legal status to which, in most cases, individuals displaced by the consequences of climate change will not be entitled.¹⁹ More than a technicality, this highlights a

14. See, e.g., Corey Robinson & Yvonne Su, *Fearmongering About People Fleeing Disasters is a Dangerous and Faulty Narrative*, THE CONVERSATION (Mar. 12, 2023), <http://theconversation.com/fearmongering-about-people-fleeing-disasters-is-a-dangerous-and-faulty-narrative-200894> (last visited Sep 11, 2023); Alexandra Tempus, *Are We Thinking About Climate Migration All Wrong?*, ROLLING STONE (Mar. 14, 2020), <https://www.rollingstone.com/politics/politics-features/climate-migration-predicted-number-climate-refugees-962251/> (last visited Sep 11, 2023); Betsy Hartmann, *Rethinking Climate Refugees and Climate Conflict: Rhetoric, Reality and the Politics of Policy Discourse*, 22 J. OF INT’L DEV. 233 (2010); on the figures and data, see also Chris Fitch, *Predictions of Mass-Migration Due to Climate Change are Rife, but not Necessarily Accurate*, GEOGRAPHICAL (Dec. 27, 2020), <https://geographical.co.uk/climate-change/are-predictions-of-mass-climate-migration-really-accurate> (last visited Sep 11, 2023); François Gemenne, *Why the Numbers Don’t Add up: A Review of Estimates and Predictions of People Displaced by Environmental Changes*, 21 GLOB.AL ENV’T CHANGE S41 (2011).

15. See, e.g., Matthew Taylor, *Climate Change “Will Create World’s Biggest Refugee Crisis,”* THE GUARDIAN (Nov. 2, 2017), <https://www.theguardian.com/environment/2017/nov/02/climate-change-will-create-worlds-biggest-refugee-crisis>.

16. See, e.g., Jane Mcadam, *Conceptualizing Climate Change-Related Movement*, CLIMATE CHANGE, FORCED MIGRATION, & INT’L. L. , 24–30 (2012) (discussing figures); Cord Jakobeit & Chris Methmann, *‘Climate Refugees’ as Dawning Catastrophe? A Critique of the Dominant Quest for Numbers*, CLIMATE CHANGE, HUMAN SECURITY AND VIOLENT CONFLICT: CHALLENGES FOR SOCIETAL STABILITY 301 (Jürgen Scheffran et al. eds., 2012); INTERNATIONAL ORGANIZATION FOR MIGRATION, MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE 15 (Frank Laczko & Christine Aghazarm eds., 2009), https://seors.unfccc.int/applications/seors/attachments/get_attachment?code=J4Q58GMPR0PEF84HJZP0WOPUWXDDDX29; Norman Myers, *Environmental Refugees in a Globally Warmed World*, 43 BIOSCIENCE 752 (1993).

17. Gaia Vince, *Is the World Ready for Mass Migration Due to Climate Change?*, BBC (Nov. 18, 2022), <https://www.bbc.com/future/article/20221117-how-borders-might-change-to-cope-with-climate-migration>; see also Carrington, *supra* note 2 (raising concerns within the national security community); but see GREGORY WHITE, CLIMATE CHANGE & MIGRATION: SEC. & BORDERS IN A WARMING WORLD CLIMATE (2011). (criticizing the security approach).

18. THE CONCEPT OF “CLIMATE REFUGEE”: TOWARDS A POSSIBLE DEFINITION (EURO. PARLIAMENTARY RESEARCH SER.), (2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI\(2021\)698753_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf).

19. See, e.g., Andrew Baldwin, *Why We Should Abandon the Concept of the “Climate Refugee,”* THE CONVERSATION (Aug. 23, 2022), <http://theconversation.com/why-we-should-abandon-the-concept-of-the-climate-refugee-182920>; W. H., *Why Climate Migrants Do Not Have Refugee Status*, THE ECONOMIST (Mar. 6, 2018), https://www.economist.com/the-economist-explains/2018/03/06/why-climate-migrants-do-not-have-refugee-status?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=18151738051&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=CjwKCAiAheacBhB8EiwAltVO25sqCGhGNC-

pressing underlying question: does the law afford any protection to people displaced by climate change? More specifically, with climate change being an inherently global challenge, does international law offer guidance, guarantee rights, or impose obligations on states in this respect?

This article sheds light on these questions by providing a concise overview of the current legal avenues and their shortcomings, reviewing recent developments, and contemplating prospects in this area.

Ultimately, this article demonstrates that, despite some encouraging developments, international law still fails to offer clear-cut, suitable, and systematic answers, leaving the protection of people displaced by climate change subject to significant uncertainty, particularly in today's political environment. Though some avenues exist, more ambitious and creative steps are likely needed to prepare the world for the challenges ahead.

I. CLIMATE CHANGE AND DISPLACEMENT: A COMPLEX CAUSALITY

The first difficulty in this area concerns the complex causal relationship between climate change and forced displacement.²⁰ While the idea that climate change may cause displacement is not especially controversial, its concrete manifestation raises several questions, for instance, whether climate change qualifies as a “driver” or “trigger” of mobility.²¹

Rather than a direct consequence of “climate change,”²² forced displacement can result from specific circumstances caused or affected by climate change. A commonly used typology distinguishes five categories of such climate-related circumstances: (1) hydro-meteorological disasters (flooding, hurricanes, etc.), (2) progressive environmental degradation and slow-onset disasters (desertification, recurrent flooding, droughts, etc.), (3) the particular case of the “sinking islands,” (4) the designation by authorities of areas as unsafe for human habitation due to environmental risks, and (5) situations of unrest or

hit0tERmrjQaeLzeQ9INpjMnLbvY8DOJiKSR8m2tG_RoCyjkQAvD_BwE&gclsrc=aw.ds; Jane McAdam & Maryanne Loughry, *We Aren't Refugees*, INSIDE STORY (Jun. 2009), <https://insidestory.org.au/we-arent-refugees/>; for other opinions less critical of the terminology of “climate refugee” see e.g., Maya Goodfellow, *How Helpful Is the Term “Climate Refugee”?*, THE GUARDIAN (Aug. 31, 2020), <https://www.theguardian.com/world/2020/aug/31/how-helpful-is-the-term-climate-refugee>; François Gemenne, *One Good Reason to Speak of “Climate Refugees,”* FORCED MIGRATION REV. (2015).

20. See Etienne Piguet et al., *Migration and Climate Change: An Overview*, 30 REFUGEE SURVEY QUARTERLY 1 (2011) (providing an overview of the issue and academic literature).

21. See, e.g., Mathias Czaika & Constantin Reinprecht, *Migration Drivers: Why Do People Migrate?*, INTRODUCTION TO MIGRATION STUDIES: AN INTERACTIVE GUIDE TO THE LITS. ON MIGRATION & DIVERSITY 49 (Peter Scholten ed., 2022), https://doi.org/10.1007/978-3-030-92377-8_3 (last visited Dec 9, 2023) (explaining the distinction between drivers and triggers of migration); see also International Federation of Red Cross and Red Crescent Societies, *Displacement and Climate: The Displacement Continuum* (Fact Sheet 3), https://ctk.climatecentre.org/downloads/modules/training_downloads/2g%20FactSheet%2003%20-%20Displacement%20and%20Climate%20-%20Displacement%20Continuum.pdf (last visited March 14, 2024) (explaining climate mobility specifically).

22. Commonly understood as the global and long-term shifts in temperatures and weather patterns.

violence resulting from increased resource scarcity.²³ Even in these instances, however, while climate change may unquestionably affect—by provoking or worsening—some of the phenomena at play, establishing with sufficient certainty the direct causal link can prove challenging.²⁴

Similarly, determining the causal link in specific individuals' decisions to move also proves difficult since forced displacement often results from an intertwined set of economic, social, political, cultural, and other factors.²⁵ In many cases, the environmental circumstances described above will merely act as an “accelerant of instability” or “risk multiplier,” meanwhile, the ultimate decision to seek safety elsewhere might result from other causes of persecution or discrimination.²⁶

Additionally, focusing on climate change raises the question of whether individuals displaced by natural disasters should receive different treatment depending on whether the event is linked to climate change.

While climate change is clearly driving human mobility at a macro level, it is often challenging to identify concrete instances at a micro level—save for limited examples such as the “sinking islands.” Even then, singling out displacement caused by climate change as opposed to other factors raises major legal and ethical questions about the extent protection should depend on the precise reasons individuals move.

II. CLIMATE CHANGE DISPLACEMENT, BORDERS, AND THE LAW

Assuming a sufficient level of causality can be established between climate change and specific instances of displacement, the second key question is the individuals' destination. While it may appear artificial, the law makes a clear distinction between those who remain within their state of nationality or habitual residence—who fall within the category of “internally displaced persons” (IDPs)—and those who cross an international border and travel to foreign states. Though the humanitarian challenges and vulnerabilities they face may be similar, the distinction results in fundamental differences in legal status and entitlement to protection. Most notably, IDPs remain entitled to the complete protection of

23. This typology was formulated by former UN Special Rapporteur on the Human Rights of Internally Displaced People, Walter Kalin, and has been widely endorsed since, Walter Kalin, *Conceptualising Climate-Induced Displacement*, CLIMATE CHANGE & DISPLACEMENT: MULTIDISCIPLINARY PERSPS. (Jane McAdam ed., 2010).

24. See, e.g., Demola Okeowo, *Examining the Link: Climate Change*, 15 ENV'L L. REV. 273 (2013).

25. THE PUSH AND PULL FACTORS OF ASYLUM RELATED MIGRATION: A LITERATURE REVIEW (EUROPEAN ASYLUM SUPPORT OFFICE), (2016); CLIMATE OF COERCION: ENVIRONMENTAL AND OTHER DRIVERS OF CROSS-BORDER DISPLACEMENT IN CENTRAL AMERICA AND MEXICO (U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, INT'L REFUGEE ASSISTANCE PROJECT, & HUM. SEC. INITIATIVE, 2023).

26. Damian Carrington, *Climate Change Will Stir “Unimaginable” Refugee Crisis, Says Military*, THE GUARDIAN, (Dec. 1, 2016), <https://www.theguardian.com/environment/2016/dec/01/climate-change-trigger-unimaginable-refugee-crisis-senior-military>; *Climate Change and Disaster-Related Displacement*, U.K. FOR UNHCR, <https://www.unrefugees.org.uk/where-help-is-needed/climate-change-and-disaster-related-displacement/> (last visited Feb 15, 2023).

their home state, as any citizen or resident is. In contrast, individuals who move across borders are in legally uncharted territory and at greater risk of seeing their protection needs ignored by states with which they have no pre-existing legal bond of nationality or residency.²⁷ For this latter category, the question of the protection potentially afforded by international law becomes critical.

The distinction is also significant because climate change-induced internal displacement has arguably received more attention over the past decades than cross-border displacement. Internal displacement has seen several important legal and policy developments,²⁸ which have clarified the obligations of states and the rights of individuals in this area.²⁹ These developments are a welcome trend, given data indicates most displacement caused by climate change occurs within a state's borders.³⁰ The trend is also unsurprising since it is easier for states to commit to protecting their citizens and residents as opposed to foreigners. In contrast, the lack of a clear legal framework and protection for individuals displaced across borders is striking. Not only are individuals displaced across borders at greater risks of suffering and human rights abuse than those displaced domestically, but they are also in a more vulnerable position, legally speaking.

Individuals displaced across borders are more vulnerable because states have been more reluctant to recognize specific obligations towards foreigners displaced by climate change than towards their nationals.³¹ They have also faced a lot less public pressure to do so, which is unlikely to change given the growing

27. See, e.g., Catherine Phuong, *Internally Displaced Persons and Refugees: Conceptual Differences and Similarities*, 18 NETHERLANDS QUARTERLY OF HUM. RTS. 215 (2000).

28. Most notable among them are the "Guiding Principles on Internal Displacement" (the "Guiding Principles") adopted by the UN Commission on Human Rights in 1998, which drew from various international legal instruments to clarify the obligations of states regarding internal displacement, including when it results from "natural or human-made disasters." Further elaborating on the challenges resulting from disasters, in 2006 the UN adopted the "Operational Guidelines on the Protection of Persons in Situations of Natural Disasters," which addressed in depth the aspects related to displacement. In 2009, the African Union also adopted the Kampala Convention, dedicated to internal displacement generally, but which specifically singled out climate change as a cause of displacement.

29. See Walter Kälin, *The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool*, 24 REFUGEE SURVEY Q. 27 (2005); Walter Kälin, *Origin, Content and Legal Character of the Guiding Principles on Internal Displacement Guiding Principles on Internal Displacement and the Law of the South Caucasus*, 34 STUD. TRANSNAT'L LEGAL POL'Y (2003); see also Chaloka Beyani, *The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law*, 102 PROCEEDINGS OF THE ASIL ANNUAL MEETING 195–198 (2008).

30. Rachel Doobs, *Climate Change Is Likely to Increase Migration*, THE ECONOMIST (, Nov. 2022), <https://www.economist.com/the-world-ahead/2022/11/18/climate-change-is-likely-to-increase-migration>; see also Rahul Balasundaram & Ryan Plano, *Climate Change & Immobility: New Study Highlights Some Too Poor to Migrate*, CLIMATE REFUGEES (Feb. 20, 2023), <https://www.climate-refugees.org/spotlight/2023/2/20/climatetraps>.

31. Michele Klein Solomon & Koko Warner, *Protection of Persons Displaced as a Result of Climate Change*, in THREATENED ISL. NATIONS: LEGAL IMPLICATIONS OF RISING SEAS & A CHANGING CLIMATE, 243, 264 (Michael B. Gerrard & Gregory E. Wannier eds., 2013); Roger Zetter, *Protecting People Displaced by Climate Change: Some Conceptual Challenges*, CLIMATE CHANGE & DISPLACEMENT: MULTIDISCIPLINARY PERSPS., 143 (Jane McAdam ed., 2010).

hostility towards immigration generally.³² States have often deliberately refrained from even acknowledging that people displaced by climate change may form a specific category of victims of forced displacement that may be legally entitled to protection outside their country of origin. Notably, states have avoided calling these individuals “refugees.”

This major discrepancy—and the sense that international movement of populations may pose even greater challenges than domestic movements³³—has led to cross-border displacement caused by climate change receiving increasing attention in recent years. Most recently, the first ever UN Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry,³⁴ dedicated his first report to the UN Human Rights Council to the topic.³⁵

However, because the law has so far not changed in response to climate change-induced displacement, determining what legal protection victims of the phenomenon may claim in a state other than their own mostly involves exploring how their situation fits within existing categories and norms.

III. “CLIMATE REFUGEES:” A LEGAL OXYMORON?

One reason the term “climate refugee” is so popular is that the status of refugee is the most widely known form of protection granted to individuals fleeing their homes and seeking protection elsewhere. However, the expression is misleading since it refers to a specific legal status from which individuals displaced by environmental factors are often excluded.

32. See, e.g., MAYA GOODFELLOW, *HOSTILE ENVIRONMENT: HOW IMMIGRANTS BECAME SCAPEGOATS* (2020); Adam M. Butz & Jason E. Kehrberg, *Anti-Immigrant Sentiment and the Adoption of State Immigration Policy*, 47 *POLICY STUDIES J.* 605 (2019).

33. With fears as to the kind of tensions, unrest, or even conflict the phenomenon could provoke, see, e.g., Brigitte Hugh & Erin Sikorsky, *NATO Review- Moving towards Security: Preparing NATO for Climate-Related Migration*, *NATO REV.* (May 19, 2022), <https://www.nato.int/docu/review/articles/2022/05/19/moving-towards-security-preparing-nato-for-climate-related-migration/index.html>; Christopher Flavelle et al., *Climate Change Poses a Widening Threat to National Security*, *THE NEW YORK TIMES* (Oct. 21, 2021), <https://www.nytimes.com/2021/10/21/climate/climate-change-national-security.html>; Julie Watson, Ellen Knickmeyer & Nomaan Merchant, *US: More Threats, More Desperate Refugees as Climate Warms*, *AP NEWS* (Oct. 21, 2021), <https://apnews.com/article/climate-environment-and-nature-united-states-united-nations-natural-disasters-f9ddc62a461308bd3f1aa370bf3d8141>; *Ground Truth Briefing: Is Climate-Related Migration a National Security Issue?*, *WILSON CENTER* (Feb. 28, 2017), <https://www.wilsoncenter.org/event/ground-truth-briefing-climate-related-migration-national-security-issue>; Lisa Friedman, *How Will Climate Refugees Impact National Security?*, *SCIENTIFIC AMERICAN*, (Mar. 23, 2009), <https://www.scientificamerican.com/article/climate-refugees-national-security/>.

34. *Climate Change Expert Brings Passion, Experience to New Post*, *OHCHR* (Apr. 29, 2022), <https://www.ohchr.org/en/stories/2022/04/climate-change-expert-brings-passion-experience-new-post>.

35. *UN Expert Calls for Full Legal Protection for People Displaced by Climate Change*, *OHCHR* (June 27, 2023), <https://www.ohchr.org/en/press-releases/2023/06/un-expert-calls-full-legal-protection-people-displaced-climate-change>.

Though a centuries-old practice,³⁶ asylum only became enshrined in international law in the twentieth century.³⁷ In 1951, in an attempt to address displacement caused by the Second World War, nineteen states adopted the Geneva Convention on the Status of Refugee (the Geneva Convention),³⁸ which was later ratified by 146 states,³⁹ and has become the cornerstone of the legal protection of foreigners seeking shelter.⁴⁰ Yet, its widely endorsed definition of who deserves international protection never evolved. It defines a refugee as:

“[A]ny person 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.”⁴¹

Although this wording may seem vague to the untrained eye, it involves specific conditions that generally exclude climate-induced displacement.

Most notably, the definition requires establishing a “well-founded fear of persecution” based on one of five grounds: race, religion, membership of a particular social group, political opinion, or nationality. Though not defined in the Convention, “persecution” has been widely interpreted as requiring, among other elements, direct human conduct—a discriminatory action or inaction—and a sufficiently predictable risk of future harm.⁴² Harm caused by environmental phenomena cannot, therefore, qualify as persecution because it does not discriminate, let alone on the basis of one of the five listed grounds.⁴³ Harm resulting from purely natural disasters or general consequences of climate change is also excluded by the requirement for direct human conduct—the well-established collective responsibility of human societies for climate change being an insufficiently direct and identifiable link. Finally, because reliably forecasting the exact consequences of climate change at a micro level is difficult with the tools available today, establishing with sufficient certainty a risk of future harm for specific individuals proves almost impossible.

36. See Elena Isayev, *Between Hospitality and Asylum: a Historical Perspective on Displaced Agency*, 99 INT’L REV. OF THE RED CROSS 75 (2017); Liza Schuster, *Asylum and the Lessons of History*, 44 RACE & CLASS 40 (2002).

37. First under the auspice of the League of Nations (Convention of 28 October, 1933 relating to the International Status of Refugees, LEAGUE OF NATIONS, TREATY SERIES VOL. CLIX NO. 3663.) and then of the United Nations, shortly after World War II. Most notably, in 1948, the Universal Declaration of Human Rights declared the right to “seek and enjoy asylum.” See Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 REV. INT. CROIX-ROUGE 727 (2001).

38. 1951 Convention Relating to the Status of Refugees, U.N., TREATY SERIES, VOL. 189, P. 137.

39. After an update in 1967, Protocol Relating to the Status of Refugees, New York, 31 January 1967

40. James C Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARVARD INT’L L. J. 129 (1990).

41. Article 1(A)(2), 1951 Convention Relating to the Status of Refugees, *supra* note 42.

42. See Francesco Maiani, *The Concept of “Persecution” in Refugee Law: Indeterminacy, Context-Sensitivity, & the Quest for a Principled Approach*, LES DOSSIERS DU GRIHL 132 (2022).

43. Rafael Leal-Arcas, *Climate Migrants: Legal Options*, 37 PROCEDIA - SOC. & BEHAV. SCIENCES 86 (2012).

At present, the only way for people displaced by climate change to fall within the scope of the refugee definition is to prove a risk of persecution, which, be it related, is separate from climate change. This includes, for instance, the risk of discrimination in the response to natural disasters—for example, in delivering humanitarian aid or medical services—or acts of violence prompted by environmental degradation.

Beyond the precise and narrow scope of the refugee definition, the current stalemate may also result from a flawed understanding of climate change itself. Some argue climate change should be seen as a social phenomenon rather than a disembodied natural “hazard” indiscriminately impacting human societies.⁴⁴ Social factors such as pre-existing systemic discriminations—based on race, gender, socio-economic class, etc.—are indeed known to have a dramatic influence on the nature and the extent of the harm suffered by communities as a result of climate-related natural disasters.⁴⁵ Instead of focusing on climate change, this approach would focus on its consequences and their surrounding circumstances—i.e., the more subtle patterns of discrimination or persecution that could be at play in climate-induced displacement.

In this respect, it is worth pointing out that, while the 1951 Geneva Convention itself proves quite restrictive, it gives states full latitude to adopt broader domestic definitions of refugees.⁴⁶ Some regional definitions already do so (see *infra*).

In the absence of any binding obligation, however, it is unlikely states will widely endorse broader interpretations. If anything, there is a trend toward narrowing the interpretation of the refugee definition—when asylum is not under attack altogether as part of growing hostility towards immigration generally.⁴⁷ In fact, some worry that attempting to widen the category could lead to a backlash and end up harming existing refugees.⁴⁸

IV. OVERCOMING LEGAL OBSTACLES AT THE REGIONAL LEVEL?

Faced with obstacles at the international level, regional frameworks and initiatives may offer alternate avenues.⁴⁹ Notably, some decades old regional

44. Matthew Scott, *Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change*, 35 REFUGEE SURVEY QUARTERLY 26 (2016).

45. Scott, *supra* note 47 at 33–36.

46. The Geneva Convention’s Article 5 in particular states the following: “[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.”

47. Paola Pannia, *Tightening Asylum and Migration Law and Narrowing the Access to European Countries: A Comparative Discussion*, MIGRANTS, REFUGEES & ASYLUM SEEKERS’ INTEGRATION IN EUROPEAN LABOUR MARKETS: A COMPARATIVE APPROACH ON LEGAL BARRIERS & ENABLERS 49 (Veronica Federico & Simone Baglioni eds., 2021), https://doi.org/10.1007/978-3-030-67284-3_3.

48. H., *supra* note 23.

49. Maria Vittoria Zecca, *The Protection of “Environmental Refugees” in Regional Contexts, in MIGRATION & THE ENV’T: SOME REFLECTIONS ON CURRENT LEGAL ISSUES & POSSIBLE WAYS FORWARD* 101 (Giovani Carlo Bruno, Fulvio Maria Palombino, & Valentina Rossi eds., 2017).

refugee definitions already endorse broader material scopes than the 1951 Geneva Convention. The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa,⁵⁰ and the 1984 Cartagena Declaration on Refugees in Latin America,⁵¹ for instance, extend refugee status to those fleeing “massive violations of human rights” and “circumstances”⁵² or “events”⁵³ that have “seriously disturbed public order.” These broader definitions could be interpreted as encompassing the adverse effects of climate change. Some uncertainty remains, however, as to whether a direct human intervention in the harm is a necessary element.⁵⁴

Though these frameworks still fail to offer a clear legal path, some recent political developments suggest things could change. The African continent, where climate change is already pushing people into exile,⁵⁵ has moved further than any other region in this respect. After a first attempt in West Africa in 2009 through the “Lomé Declaration”⁵⁶ —which failed to deliver concrete results — in 2022, fifteen African states adopted the “Kampala Ministerial Declaration on

50. A binding instrument ratified by 46 of the 55 member states of the African Union, African [or OAU] Convention Governing the Specific Aspects of Refugee Problems in Afr., Sept. 10, 1969, 1001 U.N.T.S. 45.

51. A *non*-binding yet authoritative instrument adopted by 10 Latin-American nations that have since then largely transposed the declaration’s content into their domestic law, Cartagena Declaration on Refugees, Nov. 22-24, 1984, 23 I.L.M. 1038.

52. Language used in the Cartagena Declaration.

53. Language used in the OAU Convention.

54. In Latin America for instance, state practice and statements suggest that the Cartagena Declaration was mostly meant to be restricted to displacement caused by conflict, and in any case would most likely exclude victims of natural disasters for instance, *see, e.g.,* Zecca, *supra* note 52 at 121; Hector Gros Espiell, Sonia Picado & Leo Valladres Lanza, *Principles & Criteria for the Protection of & Assistance to Central American Refugees, Returnees & Displaced Persons in Latin America*, 2 INT’L J. OF REFUGEE L. 83 (1990).

55. *See, e.g.,* MIGRATION IN WEST AFRICA: IMISCOE REGIONAL READER 108, (Joseph Kofi Teye ed., 2022), <https://link.springer.com/10.1007/978-3-030-97322-3> (last visited Apr 4, 2023); Joseph Kofi Teye, *Environmental Change and Migration in Africa*, in MIGRATION IN A GLOBALIZING WORLD: PERSPS. FROM GHANA 97 (Mariama Awumbila et al., Delali Badasu, & Joseph Teye eds., 2018); TAMER AFIFI ET AL., *Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and Horn of Africa*, UN UNIV. 9 (2012), https://d1wqtxts1xzle7.cloudfront.net/28925740/East_and_Horn_of_Africa_final_web-libre.pdf?1390875341=&response-content-disposition=inline%3B+filename%3DClimate_change_vulnerability_and_human_m.pdf&Expires=1701710396&Signature=PbMG1di1~lh5BIgTay~8w5WTzZYWccMKqLew5vu6IgvFt0TWsWvLI0KQf4LFpjxK3HCmexbeOaTQSlEuvUjwV5y-hmHyqHmzAgz8G1obxZm0AnLkM9iT40fWMSBrJnOzLJGa~JwBs2sm7Le3RaLNZDuDOuKQHcAF58dLhb5ir3ScoryPU5AmBGR68yRUwAJsBjChe1Rvlpas8Q8rn-8tjx7jGufaPT4USGFOjJEAbOxEu1vkmpyKIYr59SYO5yvvG59Qj82XH4KQ~ZgsDUEkljk3WUgUno gKDJu41ug0ZPRAoKW4qrPTzZDdC9bBjCBT31JTD320hiI26ufXRnSA__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA.

56. Lomé Declaration on Climate Change and Protection of Civilians in West Africa, Sept. 16, 2009.

Migration, Environment and Climate Change” (KDMECC).⁵⁷ The declaration committed to strengthening human-rights-based prevention, mitigation, and adaptation strategies in response to climate change-induced migration within and across borders. In September 2023, thirty-three other African states joined the declaration, making it the largest action-oriented effort to date.⁵⁸ While the KDMECC does not create a specific legal framework for protecting people affected, the declaration nonetheless marks a milestone and, to date, the clearest collective commitment to address the phenomenon.

Elsewhere, the picture looks less encouraging. In the European Union, for instance, common migration and refugee protection policies have generally proved conspicuously unwelcoming to non-Europeans.⁵⁹ Given the bloc’s growing focus on internal security and border protection, it is hard to picture a major change in the short term.⁶⁰

Though it is unclear whether regional initiatives can ultimately contribute to universal changes, they may at least allow some groups of states to move past international law’s current limitations.

V. CAN HUMAN RIGHTS LAW FILL THE PROTECTION GAP?

Human rights law has long complemented the narrow scope of international refugee law to offer some level of protection to foreigners seeking safety.⁶¹ While it does not provide for a protective legal status akin to refugee, human rights law does protect all individuals from being removed to areas where their most fundamental human rights may be violated—a key principle called “non-refoulement.”⁶² The threshold for protection is high, however, since the threat must be among the most serious: risks of torture, cruelty, inhuman or degrading

57. *Kampala Ministerial Declaration on Migration, Environment and Climate Change*, INT’L ORG. FOR MIGRATION, <https://eastandhornofafrica.iom.int/kampala-ministerial-declaration-migration-environment-and-climate-change> (last visited Sep. 17, 2023).

58. *Forty-Eight African Countries Expand Landmark Kampala Declaration on Climate Change and Human Mobility*, INT’L ORG. FOR MIGRATION, <https://www.iom.int/news/forty-eight-african-countries-expand-landmark-kampala-declaration-climate-change-and-human-mobility> (last visited Sep. 4, 2023).

59. See Vincent Chetail, *The Common European Asylum System: Bric-à-Brac or System?*, REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: THE NEW EUROPEAN REFUGEE L., 3 (Vincent Chetail, Philippe et al. eds., 2016), (discussing the EU’s asylum system).

60. Giuseppe Morgese, *Environmental Migrants and the EU Immigration and Asylum Law: Is There Any Chance for Protection?*, MIGRATION & THE ENV.: SOME REFLECTIONS ON CURRENT LEGAL ISSUES & POSSIBLE WAYS FORWARD, 47 (Giovanni Carlo Bruno et al. eds., 2017).

61. Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, HUM. RTS. & IMMIGR. 19–20 (Ruth Rubio-Marín ed., 2014).

62. This replicates, and somewhat expands, one of the 1951 Geneva Convention’s greatest contribution: the principle of non-refoulement, a French expression designating the prohibition to expel anybody to a territory where their life or freedom would be threatened, see e.g. Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT’L J. OF REFUGEE L. 373 (2008).

treatments, enforced disappearance, violations of the right to life, or the right to liberty and security for instance.⁶³

Still, the human rights protection against refoulement may, in theory, encompass circumstances involving climate change.⁶⁴ For example, at the regional level, the non-refoulement obligation in case of risks of torture and inhumane or degrading treatment found in the 1950 European Convention on Human Rights⁶⁵ was interpreted as extending to “very exceptional” humanitarian situations affecting socioeconomic circumstances when it could ultimately lead to a risk of death.⁶⁶ Though linked to health conditions in case-law,⁶⁷ this opening leaves an opportunity for creative arguments about climate change and environmental harm, given their potentially life-threatening impact.⁶⁸ That being said, the European Court’s case law requires the existence of an “actual” risk, as opposed to a potential future risk;⁶⁹ it also requires establishing a sufficient level of “reasonableness” regarding the responsibility of states to assess the risk⁷⁰—elements which may be challenging to prove in cases involving climate change.⁷¹

In contrast, a recent decision of the UN Human Rights Committee (the Committee) seemed to endorse a more flexible approach,⁷² and was hailed as a turning point.⁷³ The applicant, Mr. Ioane Teitiota, originating from the Pacific island of Kiribati, had sought asylum in New Zealand, arguing that overcrowding on Kiribati’s atolls, insufficient access to clean water, the difficulty in growing crops, and other factors resulting from climate change were threatening his right

63. See UNHRC, General comment No. 35, Art. 9 (Liberty and sec. of person), Dec. 16, 2014, CCPR/C/GC/35, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement>; Duffy, *supra* note 116.

64. Except for those treaties (Convention Against Torture and Convention on Enforced Disappearances) that require, similarly to the 1951 Geneva Convention, an affirmative human action, which in these two treaties must also be perpetrated by state agents, de facto excluding environmental harm as such.

65. Therefore, binding the 46 member states of the Council of Europe.

66. The case usually referred to is *D. v. The U.K.*, App. No. 30240/96, Eur. Ct. H.R. (1997) though its exact relevance to circumstances related to environmental harm is still a subject of contention in literature; see also the restrictive interpretation of the ECtHR in *N. v. U.K.*, App. No. 26565/05, Eur. Ct. H.R. (2008), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-86490%22%7D>.

67. See subsequent cases: *Savran v. Den.*, App. No. 57467/15, Eur. Ct. H.R. (2021); *Paposhvili v. Belg.* [GC], App. No. 41738/10, Eur. Ct. H.R. (2016).

68. For an analysis of such possible arguments, as well as further arguments on the basis of the right to physical and moral integrity (art. 8 ECHR), see Matthew Scott, *Natural Disasters, Climate Change and & Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?*, 26 INT’L J. OF REFUGEE L. 404 (2014).

69. Corina Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, 33 EUROPEAN J. OF INT’L L. 925 (2022).

70. ENVIRONMENT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS FACTSHEET (EUROPEAN CRT. OF HUM. RTS.), (2022).

71. *Id.*

72. Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, *Ioane Teitiota v. N.Z.*, (2020).

73. Kate Lyons, *Climate Refugees Can’t Be Returned Home, Says Landmark UN Human Rights Ruling*, THE GUARDIAN (Jan. 20, 2020), <https://www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling>.

to life.⁷⁴ He further pointed to the risk that Kiribati would be uninhabitable within 10 to 15 years.⁷⁵ His asylum claim was rejected, which the Committee found did not violate the 1966 International Covenant on Civil and Political Rights.⁷⁶ The expert body noted the window of time after which the applicant claimed his right to life would be threatened (10 to 15 years) allowed for action to be taken to protect or relocate the affected populations.⁷⁷ In other words, the violation of the applicant's right to life was not established at the time of his application. Meanwhile, the potential future violation was not certain enough and, in any case, allowed for the enactment of protective measures by his state. Remarkably, however, the Committee stressed that "the effects of climate change in [the states of origin] may expose individuals to a violation of their rights . . . thereby triggering the non-refoulement obligations . . ."⁷⁸ This acknowledgment opened the door for the Committee to possibly find such violations in future cases—though uncertainty remains as to the threshold of directness, certainty, and direness of circumstances needed to establish a violation of the right to life.⁷⁹

While it does not generally fill the protection gap, human rights law does provide space for novel legal arguments. Growing litigation efforts concerning climate change may also bear some fruit, including with respect to displacement.⁸⁰

VI. THE MODEST CONTRIBUTION OF THE UN GLOBAL COMPACTS

Because the question of cross-border climate change-induced displacement has continued to gain attention, there was some optimism during the negotiations on the UN Global Compacts on Refugees⁸¹ and on Migration.⁸² As the most ambitious efforts to address states' obligations in these areas in decades it was

74. Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, *Ioane Teitiota v. N.Z.*, *supra* note 75 §2.1-2.5.

75. *Id.* §7.2.

76. *Id.* §9.13-10.

77. *Id.* §9.12.

78. *Id.* §9.12.

79. *See, e.g.*, Non-refoulement and environment degradation: examining the entry points and improving access to protection, GLOB. MIGRATION RESEARCH PAPERS, GENEVA GRADUATE INST. (2020) (explaining non-refoulement under human rights law in the context of climate-induced displacement).

80. *See, e.g.*, Joyce De Coninck & Anemoon Soete, *Non-Refoulement and Climate Change-Induced Displacement: Regional and International Cross-Fertilization?*, 31 REV. OF EUROPEAN, COMPARATIVE & INT'L ENV'T L. 421 (2022); *see, e.g.*, Armando Rocha & Rômulo Sampaio, *Climate Change before the European and Inter-American Courts of Human Rights: Comparing Possible Avenues before Hum.an Rights Bodies*, 32 REV. OF EUROPEAN, COMPARATIVE & INT'L ENV'T L. 279 (2023) (on human rights litigation in relation to climate change generally).

81. Resolution adopted by the General Assembly on 17 December 2018, "Global Compact on Refugees" (United Nations, A/RES/73/151, 10 January 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/446/08/PDF/N1844608.pdf?OpenElement>.

82. Resolution adopted by the General Assembly on 19 December 2018, Annex, "Global Compact on Migration" (UN, A/RES/73/195, 11 January 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement>.

hoped that the two soft law instruments could take the matter forward.⁸³ Ultimately, they did acknowledge the role of climate change, but their contribution is limited.⁸⁴

For instance, the Global Compact for Migration refers to the UN Framework Convention on Climate Change multiple times and explicitly mentions mobility resulting from “disasters, ... climate change, and environmental degradation.”⁸⁵ It also urges states to cooperate in better evaluating the consequences of climate change,⁸⁶ and to expand legal pathways to migration for individuals affected, including by implementing planned relocation or granting visas.⁸⁷ Although such mechanisms would still fall within states’ sovereign immigration policy prerogatives and would not guarantee a level of protection equivalent to refugee status, the document has the merit of highlighting how migration policies matter in addressing the adverse consequences of climate change. These aspects alone were encouraging, especially given 152 states supported the resolution.⁸⁸

The UN Global Compact on Refugees adopted a more modest tone which reflects states’ reluctance to further address the topic within the refugee protection framework. The Compact on Refugees recognized “climate, environmental degradation, and natural disasters increasingly interact with the drivers” of displacement but stressed they are not “[direct] causes of refugee movements.”⁸⁹ The document still urges stakeholders to consider adopting

83. Note that the Compacts were not the first efforts to use soft law to address climate change-induced displacement, however. The examples of the “Nansen Initiative,” and the “Platform on Disaster Displacement,” clearly show that such initiatives can play a critical role, though neither of these two mechanisms has managed to compensate for the limitations of hard law in this area. On these initiatives, see Jane McAdam, *From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement Thematic: Remaking Climate Change and the Law*, 39 U.N.S.W.L.J. 1518 (2016).

84. See Jittawadee Chotinukul, *The Global Compacts on Refugees and for Migration and the Future of Climate Change-Induced Displaced Persons*, REFUGEE L. INITIATIVE BLOG (Jan. 27, 2021), <https://fli.blogs.sas.ac.uk/2021/01/27/the-global-compacts-on-refugees-and-for-migration-and-the-future-of-climate-change-induced-displaced-persons/>.

85. Resolution adopted by the General Assembly on 19 December 2018, Annex, “Global Compact on Migration” (United Nations, A/RES/73/195, 11 January 2019), *supra* note 85 at 9.

86. Global Compact on Migration, “Objective 2”.

87. Global Compact on Migration, “Objective 5”.

88. Walter Kälin, *The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons*, 30 INT’L J. OF REFUGEE L. 664 (2019); *The Global Compact for Migration: A breakthrough for Disaster-Displaced Persons and the Beginning of a Long Process*, DISASTER DISPLACEMENT, <https://disasterdisplacement.org/staff-member/the-global-compact-for-migration-a-breakthrough-for-disaster-displaced-persons-and-the-beginning-of-a-long-process/> (last visited Feb 15, 2023).

89. Emphasis added REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, PART II, GLOBAL COMPACT ON REFUGEES (UNITED NATION, A/73/12 (PART II), 13 SEPTEMBER 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/238/37/PDF/G1823837.pdf?OpenElement>, §8.

“measures to assist those forcibly displaced by natural disasters,”⁹⁰ in a change of terminology that shies away from singling out climate change.⁹¹

Overall, these instruments marked a step in the right direction and laid the groundwork for greater cooperation between states.⁹² However, they failed to clarify how exactly states ought to deal with climate change mobility and whether the individuals affected have any right to receive protection, leaving the current cloud of uncertainty intact.

VII. ALTERNATIVES AT THE DOMESTIC LEVEL: TEMPORARY PROTECTION AND ORDINARY MIGRATION PATHWAYS

Irrespective of their refugee law or human rights obligations, states remain free to implement domestic protection mechanisms.⁹³ Though some have set up mechanisms that may encompass climate displacement, they usually come with caveats.

A typical example of a domestic protection mechanism is the “Temporary Protection Status” (TPS) scheme in the United States (U.S.)⁹⁴—though similar systems exist elsewhere.⁹⁵ The mechanism allows for the possibility to grant temporary protection to individuals fleeing a defined set of circumstances, including “earthquake, flood, drought, epidemic, or other environmental disasters. . . resulting in a substantial, but temporary disruption of living conditions in the area affected,” which could, in theory, include climate change-induced displacement.⁹⁶

90. *Id.* §63 (emphasis added).

91. The UN General Assembly’s endorsement of the Compact similarly “expressed concern” for “climate change and environmental degradation,” but did not elaborate either, Resolution adopted by the General Assembly on 17 December 2018, “Global Compact on Refugees” (United Nations, A/RES/73/151, 10 January 2019), *supra* note 84, §59; *see, e.g.*, Jittawadee Chotinukul, *supra* note 87; Kälin, *supra* note 91.

92. Though it remains to be seen whether the calls for greater cooperation will materialize in practice.

93. *See, e.g.*, Helen Dempster & Kayly Ober, *New Zealand’s “Climate Refugee” Visas: Lessons for the Rest of the World*, CT. FOR GLOB. DEV. | IDEAS TO ACTION (Jan. 10, 2020), <https://www.cgdev.org/blog/new-zealands-climate-refugee-visas-lessons-rest-world>; Denise Margaret S. Matias, *Climate Humanitarian Visa: International Migration Opportunities as Post-Disaster Humanitarian Intervention*, 160 CLIMATIC CHANGE 143 (2020).

94. *Temporary Protected Status*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status> (last visited Feb 15, 2023).

95. *See* Vikram Kolmannskog & Finn Myrstad, *Environmental Displacement in European Asylum Law*, 11 EUROPEAN J. OF MIGRATION & L. 313 (2009); Note that, though formally an option in the E.U., the temporary protection directive was never activated until the invasion of Ukraine in 2022.

96. Immigration & Nationality Act (INA), 8 U.S.C. §244.

The mechanism was activated following earthquakes in El Salvador in 2001,⁹⁷ Haiti in 2010,⁹⁸ and Nepal in 2015,⁹⁹ but there is no example directly linked to climate change. The practice to date and the focus on “temporary disruption” also suggests a focus on disasters, as opposed to slow-onset phenomena and long-term environmental changes, which results in a limited scope. Similarly, these systems are limited in time—while climate-induced displacement requires long-term solutions—and rely entirely on states’ goodwill, which means they are at the mercy of domestic politics. In the U.S., for example, the Biden administration released a groundbreaking report on climate change and migration in 2021,¹⁰⁰ and ordered government agencies to draw up plans—which they did, some of them recommending expanding protection and migration pathways—but it has failed to take any concrete steps as of late 2023.¹⁰¹ Similarly, an innovative bill introduced in November 2023—the Climate Displaced Persons Act (CDPA)—could represent a milestone, but its fate in a divided Congress is more than uncertain.¹⁰²

Another possible avenue within domestic law involves a paradigm change: seeing climate change-induced displacement less as a crisis calling for ad-hoc humanitarian responses and more as a new normal requiring more systemic solutions, including resorting to ordinary migration mechanisms.¹⁰³

One option, probably more likely to garner support from states of destination, is to resort to labor visas.¹⁰⁴ While getting workers impacted by

97. Designation of El Salvador Under Temporary Protected Status Program (Notice), 66 Fed. Reg. 14,214 (Mar. 9, 2001).

98. Designation of Haiti for Temporary Protected Status (Notice), 75 Fed. Reg. 3,476 (Jan. 21, 2010).

99. *Temporary Protected Status Designated Country: Nepal*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nepal> (last visited Feb 15, 2023).

100. See generally REPORT ON THE IMPACT OF CLIMATE CHANGE ON MIGRATION (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf>; Adam Aton, *Biden Pushes U.S. & the World to Help Climate Migrants*, SCIENTIFIC AMERICAN (Feb. 8, 2021), <https://www.scientificamerican.com/article/biden-pushes-u-s-and-the-world-to-help-climate-migrants/>.

101. Julie Watson, *After Raising Hope, Biden Still Lacks Climate Migration Plan*, AP NEWS (Oct. 19, 2022), <https://apnews.com/article/biden-science-national-security-droughts-climate-and-environment-a168993c37a8be94767799cdfb63ea64>.

102. Jocelyn Perry Schacher Yael, *A New Bill Could Help the U.S. Lead on Climate Change & Displacement*, JUST SECURITY (Nov. 17, 2023), <https://www.justsecurity.org/90135/a-new-bill-could-help-the-u-s-lead-on-climate-change-and-displacement/>; *Ahead of COP28, Senator Markey, Congresswoman Velázquez Announce Legislation to Create Pathway for People Displaced by Climate Change*, U.S. SENATOR ED MARKEY OF MASS. (Nov. 16, 2023), <https://www.markey.senate.gov/news/press-releases/ahead-of-cop28-senator-markey-congresswoman-velazquez-announce-legislation-to-create-pathway-for-people-displaced-by-climate-change>.

103. See, e.g., Michelle Leighton & Meredith Byrne, *With Millions Displaced by Climate Change or Extreme Weather, Is There a Role for Labor Migration Pathways?*, MIGRATION INFORMATION SOURCE (Feb. 2, 2017), <https://www.migrationpolicy.org/article/millions-displaced-climate-change-or-extreme-weather-there-role-labor-migration-pathways>.

104. For a general overview, see, e.g., *Id.*

climate change to safety, host states would also make economic gains.¹⁰⁵ However, somewhat promising but also slightly cynical, this option still depends on states' goodwill and involves many limitations and practical hurdles, which hardly makes it a credible pathway.

In the short term, these avenues could have some potential; they may prove helpful in addressing specific crises, for instance. However, these national avenues remain a disparate and uncoordinated way to address an inherently global phenomenon. They are also unlikely to be suitable to respond to large-scale climate mobility in the long-term.

VIII. COULD INTERNATIONAL LAW RISE TO THE OCCASION?

Though international law unquestionably falls short of providing clear protection pathways to people affected by cross-border displacement caused by climate change, could the international legal landscape evolve and rise to the occasion as the existential threat posed by climate change becomes more tangible?

A. *Updating International Refugee Law: Fruitless, Harmful, or Necessary?*

An evident avenue would consist in the adoption of a new universal instrument in the field of refugee law addressing climate change-induced displacement specifically, either in the form of a standalone treaty or as an additional protocol to the 1951 Geneva Convention. The suggestion has been a recurring one for the past decades.¹⁰⁶ Though many thought-provoking proposals have been put forward,¹⁰⁷ the option has long been dismissed as unrealistic, over-simplistic at best, or counter-productive at worst.¹⁰⁸

Given current trends in international affairs and the challenges surrounding the adoption of the Global Compacts, adopting a new treaty seems improbable.

105. See, e.g., Benjamin Etzold, *From Prob. to Opportunity: Migration in the Age of Climate Change*, FRIEDRICH EBERT STIFTUNG (Jan. 15, 2018), <https://www.fes.de/en/displacement-migration-integration/article-page-flight-migration-integration/from-problem-to-opportunity-migration-in-the-age-of-climate-change>.

106. See Jane McAdam, 'Protection' or 'Migration'? The 'Climate Refugee' Treaty Debate, CLIMATE CHANGE, FORCED MIGRATION, & INT'L L. (Jane McAdam ed., 2012) (providing a summary of the debate).

107. See, e.g., David Hodgkinson et al., *The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change*, 36 MONASH U. L. REV. 69 (2010); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009); Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, 50 ENV'T: SCIENCE & POLICY FOR SUSTAINABLE DEV. 8 (2008); Michel Prieur et al., *Draft Convention on the International Status of Environmentally- Displaced Persons*, 12 REV. EUROPÉENNE DE DROIT DE L'ENVIRONNEMENT 395 (2008).

108. See, e.g., Jane McAdam, *Seven Reasons the UN Refugee Convention Should Not Include "Climate Refugees,"* THE SYDNEY MORNING HERALD (Jun. 6, 2017), <https://www.smh.com.au/opinion/seven-reasons-the-un-refugee-convention-should-not-include-climate-refugees-20170606-gwl8b4.html>; Jane McAdam, *Swimming Against the Tide: Why a Climate Change Displacement Treaty is not the Answer*, 23 INT'L J. OF REFUGEE L. 2 (2011).

In this context, pushing for such an option might divert attention away from discussions on what existing law may already allow for—for instance, temporary visas, labor migration, or other options discussed above.

Many, including the UN High Commissioner for Refugees, also strongly oppose such efforts, arguing it could strain the already limited resources dedicated to refugee protection, unfairly focus on forced displacement caused by climate change as opposed to other causes (conflict, poverty, non-climate-related disasters, etc.), or backfire and jeopardize the existing regime altogether.¹⁰⁹ If prompted to reconsider the scope of refugee status, states could be tempted to do the opposite and further narrow it under the pressure of growing anti-migration sentiments.

Still, one is left wondering whether this route could be what UN Secretary Guterres hinted at when stressing the role of refugee law in his February 2023 speech. More recently, the UN Special Rapporteur on human rights and climate change endorsed this option in no uncertain terms,¹¹⁰ urging the UN General Assembly to initiate negotiations on an optional protocol to the 1951 Geneva Convention.¹¹¹ Though the proposal went somewhat unnoticed, such high-profile backing suggests the option may not be entirely consigned to oblivion. As concerns grow, other prominent international bodies could also join in the conversation—including the International Law Commission, for instance, given some of its most recent work on sea-level rise,¹¹² protection in disasters,¹¹³ as well as previous attempts at investigating the right of asylum,¹¹⁴ or questions of nationality and statelessness.¹¹⁵

109. See e.g., McAdam, *supra* note 109; Mcadam, *supra* note 111.

110. “Considering that the Convention relating to the Status of Refugees comes close to affording the type of protections that are needed, it would seem logical to establish a new protocol under the Convention to give protection to persons displaced across international borders due to climate change.” UN GENERAL ASSEMBLY, PROVIDING LEGAL OPTIONS TO PROTECT THE HUMAN RIGHTS OF PERSONS DISPLACED ACROSS INTERNATIONAL BORDERS DUE TO CLIMATE CHANGE REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE, IAN FRY 18 (2023).

111. PROVIDING LEGAL OPTIONS TO PROTECT THE HUMAN RIGHTS OF PERSONS DISPLACED ACROSS INTERNATIONAL BORDERS DUE TO CLIMATE CHANGE REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE, IAN FRY, (2023).

112. “Sea-level rise in relation to international law”, *Analytical Guide to the Work of the International Law Commission*, UN INT’L L. COMMISSION, https://legal.un.org/ilc/guide/8_9.shtml (last visited Sep 14, 2023).

113. “Protection of persons in the event of disasters”, *Analytical Guide to the Work of the International Law Commission*, UN INT’L L. COMMISSION, https://legal.un.org/ilc/guide/6_3.shtml (last visited Sep 14, 2023).

114. “Right of Asylum”, *Analytical Guide to the Work of the International Law Commission*, UN INT’L L. COMMISSION, https://legal.un.org/ilc/guide/6_2.shtml (last visited Sep 14, 2023).

115. “Nationality including statelessness”, *Analytical Guide to the Work of the International Law Commission*, UN INT’L L. COMMISSION, https://legal.un.org/ilc/guide/6_1.shtml (last visited Sep 14, 2023).

B. *Time to Shift Paradigms? Displacement as a Matter of Environmental Justice*

In light of the obstacles in migration, human rights, and refugee law, some propose a change of paradigm: looking at the issue of climate-induced displacement through the lens of environmental law instead.¹¹⁶ Though this branch of law was never designed to address individual protection as such,¹¹⁷ a shift in this direction would not be completely incongruous given that environmental law and human rights law have converged in many ways in recent years,¹¹⁸ and displacement has been featuring increasingly prominently in environmental fora.¹¹⁹

Because of its pragmatic and often technical tone, reliance on scientific discourse, and inherently global scope, environmental law may also allow for a reframing of the conversation.¹²⁰ Instead of viewing responding to climate change-induced displacement as an exceptional humanitarian imperative rooted in humanist ideals, it could be seen as a pragmatic, normal, and unavoidable aspect of adapting to a changing climate.¹²¹ UN Climate Change Conferences statements have, for instance, highlighted the challenge of displacement,¹²² which evidences a growing concern for displacement, not as a standalone issue, but as one of the many consequences of climate change—and shows climate change fora may be relevant spaces to discuss protection questions arising from

116. See, e.g., Carmen G Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT'L L. J. (2018); Rina Kuusipalo, *Exiled by Emissions—Climate Change Related Displacement and Migration in International Law: Gaps in Global Governance and the Role of the UN Climate Convention*, 18 VT. J. OF ENV'T L. 614 (2017).

117. See, e.g., PIERRE-MARIE DUPUY & JORGE E. VIÑUALES, INT'L ENV'T L. 1–54 (2018).

118. See, e.g., BEN BOER & ROSEMARY MWANZA, THE CONVERGING REGIMES OF HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION IN INTERNATIONAL LAW, INT'L ENV'T L.-MAKING & DIP. REV. (Tuula Honkonen & Seita Romppanen eds., 2019), <https://papers.ssrn.com/abstract=3503157> (last visited Sep 11, 2023); BOYLE ALAN, HUMAN RIGHTS AND THE ENVIRONMENT: WHERE NEXT?, III CHALLENGES IN INT'L HUM. RTS. L. (Menno T. Kamminga ed., 2014); Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized*, 35 DENVER J. OF INT'L L. & POLICY (2006).

119. It also would not be entirely new since back in 1994 the UN Convention on Drought and Desertification already acknowledged displacement United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, United Nations, Treaty Series, vol. 1954, p. 3, (1996).

120. See, e.g., DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW (2010) (pertaining to the specificities of international environmental law).

121. See Roman Hoffmann et al., *Strengthening the Science–Policy Interface in the Climate Migration Field*, INT'L MIGRATION (2023), <https://onlinelibrary.wiley.com/doi/abs/10.1111/imig.13125> (discussing the science-policy aspect).

122. See Jamie Slater, *Will COP27 Be a Breakthrough in Addressing Climate-Related Mobility?*, ECDPM (Oct. 31, 2022), <https://ecdpm.org/work/will-cop27-be-breakthrough-addressing-climate-related-mobility>; Fulvia Staiano, *State Responsibility for Climate Change under the UNFCCC Regime: Challenges and Opportunities for Prevention and Redress*, MIGRATION AND THE ENVIRONMENT: SOME REFLECTIONS ON CURRENT LEGAL ISSUES AND POSSIBLE WAYS FORWARD 75 (Giovanni Carlo Bruno et al. eds., 2017); see also (in French) CHRISTEL COUNIL & BENOÎT MAYER, LES MIGRATIONS ENVIRONNEMENTALES: ENJEUX ET GOUVERNANCE 75–95 (2014).

displacement.¹²³ This angle could also encourage states to approach displacement holistically and incorporate prevention and mitigation considerations in their policies while designing durable solutions.¹²⁴

More recent conversations in environmental law may also allow for a somewhat opposite yet complementary outlook: a deeper and more political challenge to the current attitude towards protecting displaced persons, supported by concepts anchored in concerns for justice, fairness, and equity. For instance, the environmental or climate justice framework has highlighted the role—and corresponding responsibility—of specific nations in global climate change and its consequences,¹²⁵ including displacement and migration.¹²⁶ At present, while the wealthier developed nations have contributed the most to the global greenhouse gas emissions, for instance,¹²⁷ they also prove the most reluctant to protect people fleeing from areas that have contributed very little to climate change.¹²⁸ In this regard, environmental law concepts such as “common but differentiated responsibilities” could be invoked to pressure specific states into taking greater responsibility, if only financially.¹²⁹ If the parallel is bold, it may not be far-fetched, at least from an advocacy perspective.

Conversations aimed at addressing climate change may also prove conducive to the development of new legal tools. After all, recent developments once deemed unimaginable suggest the pressure of the climate emergency can accelerate change: the 2016 International Law Commission’s “Draft Articles on the Protection of Persons in the Event of Disasters” may soon be turned into an international treaty.¹³⁰ Meanwhile, efforts to make it an international crime to

123. Jamie Slater, *supra* note 125; *see also* Lauren Nishimura, ‘Climate Change Migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, 27 INT’L J. OF REFUGEE L. 107 (2015).

124. *See, e.g.*, (in French) COUNIL & MAYER, *supra* note 125 at 77–78.

125. *See, e.g.*, Alice Kaswan, *Environmental Justice and Environmental Law*, 24 FORDHAM ENV’T L. REV. 149 (2013).

126. *See, e.g.*, Francesca Rosignoli, *Environmental Justice and Climate-Induced Migration*, CLIMATE REFUGEES: GLOB., LOC. & CRITICAL APPROACHES 301 (Avidan Kent & Simon Behrman eds., 2022); *see also* *Climate justice: Global North Owes \$170 Trillion for Excessive Carbon Dioxide Emissions, Says Study*, PHYS.ORG (2023), <https://phys.org/news/2023-06-climate-justice-global-north-owes.html> (discussing the responsibility for Climate Change).

127. *See, e.g.*, Simon Evans, *Analysis: Which Countries Are Historically Responsible for Climate Change?*, CARBON BRIEF (Oct. 5, 2021), <https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/>; Duncan Clark, *Which Nations are Most Responsible for Climate Change?*, THE GUARDIAN (2011), <http://www.theguardian.com/environment/2011/apr/21/countries-responsible-climate-change>.

128. *See, e.g.*, *Africa Suffers Disproportionately from Climate Change*, WORLD METEOROLOGICAL ORG. (Sep. 4, 2023), <https://wmo.int/media/news/africa-suffers-disproportionately-from-climate-change>; STATE OF THE CLIMATE IN AFRICA 2022, (2022), <https://public.wmo.int/en/our-mandate/climate/wmo-statement-state-of-global-climate/Africa-2022>.

129. Robyn Eckersley, *The Common but Differentiated Responsibilities of States to Assist and Receive ‘Climate Refugees’*, 14 EUROPEAN J. OF POL. THEORY 481 (2015).

130. *See* Arnold N. Pronto, *Developments on the Draft Articles on the Protection of Persons in the Event of Disasters (2021)*, 4 YEARBOOK OF INT’L DISASTER L. ONLINE 467 (2023); DRAFT ARTICLES ON THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS, WITH COMMENTARIES, II YEARBOOK OF THE

engage in actions that harm the environment—“ecocide”—are gaining pace.¹³¹ Among other positive developments,¹³² these examples suggest other ambitious legal advances related to the changing climate and environment are not impossible.

C. *Better than Nothing: Regional Baby Steps and Case Law Developments*

Ultimately, as climate change affects different parts of the world differently, the current gridlock is more likely to be overcome at a regional or bilateral level under the pressure of circumstances.

As highlighted earlier, African initiatives provide an example in this respect. Although other regions seem reluctant to follow Africa’s lead, given the effects of climate change will only worsen, things could change. Though an unlikely candidate, even the E.U. could arguably break away from its restrictive approach and embrace a more protective stance towards foreign victims of climate change under pressure from its civil society or foreign partners or if facing the prospect of a humanitarian crisis at its borders.¹³³ After all, the European block did rise to the occasion—to an extent—by displaying unprecedented solidarity and activating its Temporary Protection Directive for the first time when Ukrainians fled the Russian invasion in large numbers.¹³⁴ The circumstances are, of course, different, but the precedent is there. If not multilateral, advances could take place through local bilateral efforts—like the recent Australia-Tuvalu treaty that creates a migration pathway for citizens of the island nation.¹³⁵

INT’L L. COMMISSION, (2016), https://legal.un.org/ilc/publications/yearbooks/english/ilc_2016_v2_p2.pdf (Though they do not provide new binding obligations in the area of displacement, the Draft Articles do refer to, and take into consideration, the specific challenges posed by displacement and generally calls for better cooperation between states in light of their existing international legal obligations (especially in the area of human rights)).

131. Isabella Kaminski, *Growing Number of Countries Consider Making Ecocide a Crime*, THE GUARDIAN (Aug. 26, 2023), <https://www.theguardian.com/environment/2023/aug/26/growing-number-of-countries-consider-making-ecocide-crime>; Kate Mackintosh & Lisa Oldring, *Watch This Space: Momentum Toward an International Crime of Ecocide*, JUST SEC. (Dec. 5, 2022), <https://www.justsecurity.org/84367/watch-this-space-momentum-toward-an-international-crime-of-ecocide/>.

132. See, e.g., James Harrison, *Significant International Environmental Law Developments: 2022–2023*, 35 J. OF ENV’T L. 467 (2023).

133. *Climate-induced displacement and migration: What role for the European*, EUROPEAN POL’Y CTR., <https://www.epc.eu/en/Projects/Climate-induced-displacement-and-migration-What-role-for-the-European~4c1684> (last visited Feb 15, 2023).

134. SERGIO CARRERA ET AL., THE EU GRANTS TEMPORARY PROTECTION FOR PEOPLE FLEEING WAR IN UKRAINE: TIME TO RETHINK UNEQUAL SOLIDARITY IN EU ASYLUM POLICY 4 (2022), https://cdn.ceps.eu/wp-content/uploads/2022/03/CEPS-PI2022-09_ASILE_EU-grants-temporary-protection-for-people-fleeing-war-in-Ukraine-1.pdf.

135. Daniel Hurst & Josh Butler, *Tuvalu Residency and Security Treaty: What Is It and Why Is Australia Doing It?*, THE GUARDIAN (Nov. 10, 2023), <https://www.theguardian.com/australia-news/2023/nov/10/tuvalu-residency-and-security-treaty-what-is-it-and-why-is-australia-doing-it>.

In the short term, the other (modest) possible positive developments are more likely to come from judicial interpretation: prompted to apply existing legislation on refugee protection and human rights to cases involving climate change-induced displacement, domestic and regional courts could contribute to widening the interpretation of current frameworks, for instance concerning refugee status or non-refoulement under human rights law. In addition to potential individual wins, strategic-litigation could prove promising in this respect.¹³⁶ Though not related to displacement per se, recent international proceedings have attracted much attention and could set precedents—for instance, the European Court of Human Rights case arguing European states are failing to protect their citizens against climate change.¹³⁷ At the universal level, in addition to the International Tribunal for the Law of the Sea in 2022,¹³⁸ the International Court of Justice was also asked earlier in 2023 to deliver an Advisory Opinion on the obligation of States in relation to climate change.¹³⁹ This latter, because it seeks clarifications regarding the responsibility of states concerning “peoples and individuals of the present and future generations affected by the adverse effects of climate change,” could force the Court to touch upon the question of displacement.¹⁴⁰ The Inter-American Court of Human Rights is examining a similar request.¹⁴¹

The litigation route has the advantage of circumventing some political obstacles, though, in addition to uncertain success, it could backfire. As tensions around border security and immigration control have continuously grown, heightened by political polarization and disinformation, courts and judges have already found themselves in the hot seat and facing accusations of “judicial

136. See, e.g., Isabella Kaminski, *Lawsuits Are Key Tool in Delivering Climate Justice, Says UN Body*, THE GUARDIAN (Jul. 27, 2023), <https://www.theguardian.com/environment/2023/jul/27/lawsuits-are-key-tool-in-delivering-climate-justice-says-un-body>; Maiko Meguro, *Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN J. OF INT'L L. 933 (2020).

137. Sandra Laville & Sandra Laville, *Young People to Take 32 European Countries to Court over Climate Policies*, THE GUARDIAN (Sep. 14, 2023), <https://www.theguardian.com/environment/2023/sep/14/young-people-to-take-32-european-countries-to-court-over-climate-policies>.

138. Karen McVeigh, *Small Island Nations Take High-Emitting Countries to Court to Protect the Ocean*, THE GUARDIAN (Sep. 10, 2023), <https://www.theguardian.com/environment/2023/sep/10/small-island-nations-take-high-emitting-countries-to-court-to-protect-the-ocean>.

139. Nina Lakhani & Nina Lakhani, *United Nations Adopts Landmark Resolution on Climate Justice*, THE GUARDIAN, (Mar. 29, 2023), <https://www.theguardian.com/environment/2023/mar/29/united-nations-resolution-climate-emergency-vanuatu>.

140. Jennifer Robinson, *UN General Assembly Adopts Resolution to Request an Advisory Opinion from the International Court of Justice on Climate Change*, DOUGHTY ST. CHAMBERS (Mar. 30, 2023), <https://www.doughtystreet.co.uk/news/un-general-assembly-adopts-resolution-request-advisory-opinion-international-court-justice>.

141. Juan Auz & Thalia Viveros-Uehara, *Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights*, EJIL: TALK! (Mar. 2, 2023), <https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/>.

activism.”¹⁴² In this context, they could find it safer to err on caution and stick to conservative—or even narrower—interpretations, or defer to states’ appreciations.¹⁴³ Still, domestic, regional, and international litigation efforts provide more hope than the uncertain prospect of a new universal treaty.

CONCLUSION: THE INADEQUACY OF THE LAW IN THE FACE OF THE
CHALLENGES AHEAD

While the reality of climate change-induced cross-border displacement is no longer in question, and while the topic has grown in prominence, the law still seems largely inadequate in the face of the challenges ahead. The core existing legal frameworks fail to provide clear indications as to how states should approach the phenomenon, leaving it up to their goodwill to grant protection to individuals displaced by climate change, adding great uncertainty to their already vulnerable situation.

While refugee law is not necessarily doomed to irrelevance, the obstacles are significant, and it will take political willingness—or bold judicial interpretation—to make it suited to address climate-induced displacement. Meanwhile, the guarantees provided by human rights law may exclude many and only guarantee minimal protection to those most at risk—while mostly leaving it to states to decide how to deal with individuals who cannot be removed but are denied refugee status. In many instances, regular or emergency immigration schemes may be better suited to address the phenomenon. However, they have many limitations and depend on states’ compassion or need for foreign labor.

Overcoming this impasse will be an uphill battle: it will need decisive political leadership, but it may also require creative solutions. In this respect, environmental law provides interesting tools and could prove helpful—and even critical—to reframe the conversation from a narrow one that approaches the phenomenon as a “problem” and provides merely short-term and case-by-case solutions to a broader one that approaches it as an inherent consequence of climate change and requires long-term and collective solutions anchored in values of justice and solidarity.

This analysis also suggests advances may be more likely to come from regional or local bilateral initiatives rather than universal ones. Africa and South America, for instance, could see meaningful developments within the next few

142. See, e.g., Jamie Bullen et al., *I Will Not Allow a Foreign Court to Block Flights, Says Rishi Sunak*, THE TELEGRAPH (Nov. 15, 2023), <https://www.telegraph.co.uk/politics/2023/11/15/rwanda-deportation-policy-supreme-court-ruling-live-updates/>; Adam Edelman & Dartunorro Clark, *White House Attacks “Activist Judges” After Court Blocks Trump’s Asylum Ban*, NBC NEWS (Nov. 20, 2018), <https://www.nbcnews.com/politics/immigration/judge-bars-trump-administration-denying-asylum-migrants-who-enter-illegally-n938271>; see also Marko Bošnjak & Kacper Zajac, *Judicial Activism and Judge-Made Law at the ECtHR*, 23 HUM. RTS. L. REV. ngad015 (2023) (generally on judicial activism).

143. See, e.g., *Is the European Court of Human Rights going too far in expanding the scope of certain rights under the Convention?*, YOUNG J. OF EUROPEAN AFFS. (May 17, 2021), <https://yjea.org/2021/05/17/is-the-european-court-of-human-rights-going-too-far-in-expanding-the-scope-of-certain-rights-under-the-convention/>.

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years. However, it will likely take Europe and other Western nations longer before they feel compelled to act.

In parallel, non-binding norms and mechanisms of cooperation as well as multi-stakeholder processes—most notably the “Nansen Initiative,” the “Platform on Disaster Displacement,” and the Global Compact on Migration, for instance—have already demonstrated their value and may prove instrumental going forward,¹⁴⁴ but only to the extent they deliver on their promises and do not serve as excuses to avoid making stronger commitments.

Ultimately, in the short term, the best chance for those forced to flee their homes by the effects of climate change will most likely not come from groundbreaking new treaties or a paradigmatic change of the conversation. For those eligible, it will come from some of the diverse and fragmented instruments currently available. For the others, it will come from the hope of seeing incremental changes materialize.

While incremental changes, fragmented regional, bilateral, or national avenues, or non-binding frameworks are not inherently wrong, they do certainly complexify the picture and may prove inadequate to deal with large flows of populations in the long term—whether they prove to be “on a biblical scale” or not. Sooner or later, whether at the universal or regional level, more comprehensive, systematic, and collective solutions will need to be found.

144. McAdam, *supra* note 84.