

An Uncertain Future: Legal Challenges and the Forthcoming Climate Refugee Crisis

Publications

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The Russian invasion of Ukraine has led to over 11 million people fleeing their homes, and 5 million who have reportedly left Ukraine – a staggering number for a conflict that began in late February. However, while the war in Ukraine is one of the latest events causing a surge of refugees, those fleeing Russian aggression are by no means alone. As of the most recent data from the United Nations High Commissioner on Refugees (“UNHCR”), which counts until mid-2021, there were 20,835,367 people qualified as refugees under the UNHCR’s mandate – an uptick from the 20,661,855 recorded in 2020. Additionally, the UNHCR tracked 50,872,901 “internally displaced persons of concern” during the same period in 2021.

These numbers reflect the staggering impact of human conflict and economic instability; however, they do not show the full impact of human activity. The term “refugee” has a specific definition, laid out in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (together “the Convention”). The definition includes any person who crosses a border “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” That definition, written 24 years before Wallace Broecker first put the term “global warming” into the public domain, does not include those fleeing climate disasters in its definition. While recent legal guidance from the UNHCR notes that communities impacted by climate change “may be exposed to a risk of human rights violations that amount to persecution within the meaning of the 1951 Convention” due to limitations on “access to and control over land, natural resources, livelihoods, individual rights, freedoms and lives”, impacts of climate change alone do not qualify someone fleeing their homeland as a refugee. This is because fleeing formerly arable land that no longer sustains crops due to gradual desertification or fleeing cities that have become unlivable due to flooding, fires, or other extreme events do not inherently create “a well-founded fear of being persecuted.”

Is it time for an update to the definition? Some commenters believe so. According to the World Bank, by 2050 over 143,000,000 people could be intra- or internationally displaced from Sub-Saharan Africa, South Asia, and Latin America by climate change. This is roughly equivalent to the populations of California, Texas, Florida, New York, Pennsylvania, Illinois, and Tennessee combined. Without changes to how we view refugees, many of these people may be forced from the areas

they've lived for generations without any legal status or protections. Advocates who support such changes argue that the current definition of "refugee" under international law fails to include many people forced to flee their home for reasons that fit the *spirit* of refugee law, but not the strict limitations imposed by the 1951 Convention. The (aptly named) advocacy group "Climate Refugees" gives examples of hypothetical cases, including "the Bangladeshi family displaced across borders by a disaster, the subsistence farmer in Chad with no option but to leave his country because he lacks water for farming, or a mother forced to flee her country because of a climate change-induced resource war." Such displaced people fall into the goals as stated in the preamble of the 1951 Convention that all people should be able to "enjoy fundamental rights and freedoms without discrimination." As further articulated by Andrew Schoenholtz in the Chicago Journal of International Law, while "some individuals displaced by natural disasters and climate change may be 'persecuted' in connection with a characteristic protected by the Refugee Convention, the vast majority of these newest forced migrants will need new norms developed to address their unique situation."

Other (though less ubiquitous) compacts or treaties such as the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, by the Organisation for African Unity – subsequently adopted by the African Union ("the OAU Convention") and the 1984 Cartagena Declaration have expanded the definitions of "refugee", but these may also be inadequate for what advocates seek. The 1969 OAU Convention was organized as many African states were either newly freed from colonialism, or else still fighting for freedom. As such, the definition of refugee was expanded to include "every person who, owing to external aggression, occupation, foreign domination *or events seriously disturbing public order* in either part or whole of his country of origin or nationality." The "events seriously disturbing public order" could likely be found to include natural disasters but may still not be fully inclusive of climate change's pernicious, but slower-acting changes. Further, the requirement of "serious" disturbance of the public order may require large-scale disorder, which may not be present in each circumstance. The Cartagena Convention is a non-binding regional instrument signed by 10 Latin American nations. The definition of refugee is like that found in the OAU Convention's and includes "persons who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." These two instruments are uniquely broad in their definition, and even they may not include the full sum of those advocates seek to include in a new definition of "climate refugee."

However, that may not be the case for long. On February 4, 2021, President Biden signed Executive Order 14013 entitled *Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration*. This order required the National Security Advisor and Secretaries of State, Defense, Homeland Security, the Director of USAID, and the Director of National Intelligence to "prepare and submit ... a report on climate change and its impact on migration, including forced migration, internal displacement, and planned relocation." That report, released in October of 2021, advocates for an interagency working group to address growing

climate migration and its effects, and an expansion of the use of Temporary Protected Status to help resettle those impacted most severely by climate disasters. While stopping short of what some advocates hoped for in terms of seeking to declare climate refugees protected, the report at least shows a willingness to substantively engage in the effects of climate change and its role in global movement.

As the world grapples with how to prevent climate change, and increasingly turns to how to adapt to the effects of climate change, climate refugees will continue to be a growing problem around the world. Addressing their legal status is just one step in a complex and quickly evolving landscape.

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