

## The difficult legal consideration of climate migrants

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Arjun Claire and Jérôme Élie invite us to the arcane debates that led to the adoption of the two Global Compacts on Migration and Refugees. If these texts express a “watered down” view of climate issues, it is partly because of fears expressed by some States that the international definition of refugees might be expanded. Nevertheless, they open the way to more extensive protection.

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The novelist, Amitav Ghosh, writes that his ancestors were “ecological refugees” way before climate-induced population movement was conceptualised as forced displacement<sup>1</sup>. In a book, he notes that his forebears fled what is now Bangladesh in the mid-1850s after a river swallowed their village, and came to settle on the banks of the Ganges, in India.

For generations, mobility has been a defining characteristic of humanity, much of it driven by environmental factors. What has changed in recent years, however, is the volume of carbon dioxide released by humans into the atmosphere, which has dramatically accelerated global warming. Climate change has become our everyday reality, and its devastating consequences – forest fires, cyclones, floods, rising sea levels – crop up all too often on our news feeds.

### An invisible category

Despite this, the climate-displaced<sup>2</sup> remain invisible although a slew of terminologies has sprung up to give them an identity – environmental refugees or migrants, climate refugees and climate-displaced person, to name a few<sup>3</sup>. And none of which are recognised in international law. These varying conceptualisations have further distorted the extent of the protection that those displaced by climate-related events can claim. Although human rights law provides a basic protection cover to all human beings, specific protection guarantees can only be claimed if a person qualifies as a refugee or migrant worker. From a protection perspective, therefore, how those displaced by climate-related factors are categorised assumes significant importance, notably for cross-border displacement<sup>4</sup>.

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<sup>1</sup> Amitav Ghosh, *The Great Derangement. Climate Change and the Unthinkable*, Penguin, 2016, p.4.

<sup>2</sup> People can be displaced within or across borders as a result of climate-related factors. “Internally displaced persons (IDPs)” are “entitled to protection under applicable provisions of human rights law and more specifically the Guiding Principles on Internal Displacement as well as national laws and policies on internal displacement covering climate-related displacement” (*Walter Kälin and Nina Schrepfer, Context of Climate Change Normative Gaps and Possible Approaches*, February 2012, UNHCR). There is, however, no normative framework for those displaced across borders because of climate-related events, on which this article focuses.

<sup>3</sup> The European Commission, “The concept of ‘climate refugee’: Towards a possible definition”, February 2019.

<sup>4</sup> The Platform on Disaster Displacement (PDD), a state-led process, defines cross-border displacement as “situations where people flee or are displaced across borders in the context of sudden- or slow-onset disasters, or in the context of the effects of climate change”.

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However, the cross-border, climate-displaced<sup>5</sup> currently occupy a liminal space between refugees and migrants. This is primarily because of the complexity in establishing direct causation between climate-related events and displacement, which in turn provokes debates around the voluntary or forced nature of such movements. Even where there is agreement that climate change impels displacement, by aggravating the intensity and frequency of natural hazards or through more gradual and insidious means, there is reluctance to categorise the cross-border, climate-displaced as refugees for several reasons.

Some argue that the 1951 Refugee Convention, created to protect those with a well-founded fear of persecution, may not provide sufficient grounds for protecting the cross-border, climate-displaced<sup>6</sup>. Others fear that opening negotiations to expand the refugee definition would encourage States to trade off their existing obligations as a condition to include the climate-displaced, thus weakening the refugee regime<sup>7</sup>. For its part, the International Convention on Protection of the Rights of All Migrant Workers and Members of their Families (1990) does not cover the specific needs of those fleeing climate-related events, for example, the right to admission or continued stay in a country<sup>8</sup>. In short, the climate-displaced who cross borders to seek protection and assistance are not doing so under conditions that are classically recognised as persecution, nor are they doing so primarily to seek better economic prospects. This has led to what experts describe as a “protection gap”.

Since 2010, starting with the Cancun Outcome Agreement, global climate policy has increasingly recognised the need to address climate-induced displacement. The Nansen Agenda for Protection, led by Switzerland and Norway and endorsed by several States in 2015, marked a landmark step in laying down relevant temporary protection standards. Mitigation and adaptation measures to minimise the risk of displacement have also gained traction. The Sendai Framework for Disaster Risk Reduction 2015–2030, for example, calls for intergovernmental cooperation to reduce displacement risk, while the Conference of the Parties (COP21) in Paris agreed to establish a task force to develop recommendations for integrated approaches to avert, minimise and address displacement related to the adverse impacts of climate change<sup>9</sup>. All these initiatives, however, stop short of establishing clear conditions of entry into another country for the climate-displaced or rights they could enjoy during their stay. They also do not offer long-term solutions.

### The disappointed hope of filling the void?

For civil society, therefore, the 2016 New York Declaration for Refugees and Migrants held immense promise, opening a historic opportunity to address a key protection gap. Not only did it explicitly acknowledge that people move in response to the adverse impacts of climate change and disasters, it also committed to addressing the drivers of large movements of people including environmental degradation, climate change and disasters<sup>10</sup>. It also affirmed support

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<sup>5</sup> Disaster displacement refers to “situations where people are forced to leave their homes or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard”, PDD.

<sup>6</sup> Jane McAdam, “Seven reasons the UN Refugee Convention should not include climate refugees”, *Sydney Morning Herald*, 6 June 2017.

<sup>7</sup> “Why climate migrants do not have refugee status”, *The Economist*, 6 March 2018.

<sup>8</sup> Volker Türk, “Temporary protection arrangements to fill a gap in the protection regime”, *Forced Migration Review*, No.49, May 2015.

<sup>9</sup> “Human mobility in the context of disasters and the adverse effects of climate change”, *PDD Messages*, PDD, 2018.

<sup>10</sup> “New York Declaration for Refugees and Migrants”, Resolution adopted by the General Assembly, on 19 September 2016, A/RES/71/1, Paragraph 43, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_71\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf)

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for migrants in countries experiencing disasters<sup>11</sup>. This encouraged civil society to engage actively in the consultations for the two Compacts stemming from the New York Declaration in order to ensure adequate protection and assistance for the cross-border, climate-displaced: the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration.

Civil society provided ambitious recommendations in advance of the formal consultations for the Refugee Compact, calling for the development of new normative positions to address displacement in the context of climate change<sup>12</sup>. The need to forge complementarity between the two compacts was also vigorously advocated by civil society organisations in order to address the current reality of cross-border movements, where people move for a variety of complex reasons but use the same routes and means of transport; experts call this phenomenon “mixed migrations”.

Even before the drafting process had started, the United Nations High Commissioner for Refugees (UNHCR) had highlighted the relevance of “climate change, disaster and displacement in the Global Compacts”<sup>13</sup>. Thereafter, as pen-holder for the Refugee Compact, the UNHCR acknowledged in the first drafts that environmental degradation and natural disasters were increasingly interacting with persecution, conflict, violence and human rights violations to drive refugee movements<sup>14</sup>. Draft one also laid the ground for determining international protection needs in mixed movements<sup>15</sup>, while underlining that those displaced by natural disasters could receive protection through regional refugee instruments<sup>16</sup>. During the negotiations, however, several States cautioned against what they perceived as a potential broadening of the refugee definition, bringing the Compact beyond the envisaged purview of the 1951 Convention and UNHCR mandate.

More importantly, with refugee norms considered as binding, including climate displacement could have been perceived by States as a move towards expanding their own obligations<sup>17</sup>. Nevertheless, there was also support from a few States, notably those at the frontline of climate change in East Africa, South Asia and Latin America to explore complementary forms of protection for those displaced by natural hazards and climate change. Many acknowledged that mixed flows were a reality and called for the Compact to provide practical guidance to bolster operational coordination and cooperation. As negotiations progressed, a reference to the Nansen initiative in the Compact became a key sticking point. Some States called for its deletion, arguing that referring to a text which had not gathered wide intergovernmental consent could hinder ultimate consensus on the Compact. As the Nansen initiative was withdrawn from the Global Compact on Refugees (GCR), references to mixed movements also became a source of debate. Some perceived that the term incorporated other categories, such as economic migrants, which, they said, should not feature in a Compact focused exclusively on refugees. When the third iteration of the GCR was released, references to disaster displacement and mixed movements had therefore been further pared down. In the interest of reaching consensus, States advocating for a stronger emphasis on disaster displacement accepted this

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<sup>11</sup> *Ibid.*, Paragraph 50.

<sup>12</sup> NGO Key Messages for the 10th High Commissioner’s Dialogue on Protection Challenges “Towards a Global Compact on Refugees”, *International Council of Voluntary Agencies (ICVA)*, 12-13 December 2017.

<sup>13</sup> “Climate Change, Disaster and Displacement in the Global Compacts: UNHCR’s Perspective”, *UNHCR*, November 2017.

<sup>14</sup> The Global Compact on Refugees (GCR), Draft 1, Paragraph 1, *UNHCR*, 9 March 2018.

<sup>15</sup> GCR, Draft 1, *op. cit.*, Para 52.

<sup>16</sup> *Ibid.*, Para 55.

<sup>17</sup> T. Alexander Aleinikoff, “The Unfinished Work of the Global Compact on Refugees”, *International Journal of Refugee Law (IJRL)*, 2018, p.5.

*status quo*, but underscored the need for closer operational cooperation between the UNHCR and the International Organization for Migration (IOM).

By this time, references to climate displacement had been so pruned away that the nation of Tuvalu felt compelled to intervene, noting that addressing climate displacement was a human rights obligation. Non-Governmental Organisations (NGOs) also expressed disappointment at the gradual erosion of the ambition to address climate displacement and underlined the urgent need to address all forms of drivers forcing people to seek safety across borders<sup>18</sup>.

### Minimal protection of climate refugees

Despite these drawbacks, the final draft of the Global Compact on Refugees succeeded in introducing language related to climate and disaster displacement. It recognises that “climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements”<sup>19</sup>. UNHCR actually considers that the GCR “effectively acknowledges and addresses the reality of increasing displacement in the context of disasters, environmental degradation and climate change, and provides a basis for measures to tackle the many challenges arising in this area”<sup>20</sup>. It contains subtly-crafted provisions that can allow for the mobilisation of international responsibility-sharing for countries affected by such displacements<sup>21</sup>. National arrangements, support platforms, regional approaches and ultimately commitments made at the Global Refugee Forum may indeed be used as tools to address such situations. The GCR also refers to the granting of temporary protection as part of relevant responses. Importantly, in paragraph 63, the Compact foresees the possibility for States to offer humanitarian stay arrangements for those forcibly displaced by natural disasters. And it calls to galvanize support for reducing disaster risks<sup>22</sup> through forecasting and including refugees in disaster risk reduction strategies<sup>23</sup>.

### The gateway to legal migration due to natural disaster

Similarly, negotiations for the Global Compact for Safe, Orderly and Regular Migration [*“Migration Compact” in the following text*] were heated on the issue of climate displacement. But as it became clear that space for considering the issue had shrunk in the Refugee Compact, climate change advocates homed in on the Migration Compact<sup>24</sup>. Their efforts yielded results; most likely because the Migration Compact is perceived to be built on a loose amalgam of human rights laws and agreements that do not threaten to impose new legally-binding obligations. The Migration Compact recognises the disaster-migration nexus<sup>25</sup>, and calls for developing mitigation, adaptation and resilience strategies to sudden and slow-onset disasters as well as climate change and environmental degradation<sup>26</sup>. Furthermore, it opens legal migration pathways for those forced to cross borders as a result of sudden and slow-onset disasters in the form of

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<sup>18</sup> NGO intervention on Introduction, Agenda item 1. Towards a Global Compact on Refugees, Formal Consultations 4, *ICVA*, 8-10 May 2018.

<sup>19</sup> “Global compact on refugees”, Report of the United Nations High Commissioner for Refugees (UNHCR), Part II, A/73/12, 13 September 2018, [https://www.unhcr.org/gcr/GCR\\_English.pdf](https://www.unhcr.org/gcr/GCR_English.pdf)

<sup>20</sup> “Climate change and disaster displacement in the Global Compact on Refugees”, UNHCR, February 2019.

<sup>21</sup> For example, *Ibid.*, paragraph 12.

<sup>22</sup> *Ibid.*, paragraph 53.

<sup>23</sup> *Ibid.*, paragraphs 9 and 79.

<sup>24</sup> T. Alexander Aleinikoff, “The Unfinished Work of the Global Compact on Refugees”, *IJRL*, 2018, p.5.

<sup>25</sup> Walter Kalin “The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons”, *IJRL*, 2018, p.2.

<sup>26</sup> Global Compact for Safe, Orderly and Regular Migration, Objective 2 (h and i).

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humanitarian visas, temporary work permits and planned relocation<sup>27</sup>.

### The lack of a comprehensive legislative framework

Taken together, the two Compacts reinforce existing guarantees, and provide renewed impetus to address climate change-related displacement. Yet these remain piecemeal. A comprehensive legal framework to address climate change-related, cross-border displacement which can guarantee access to territory, assure status and rights during stay, and offer long-term solutions is still lacking. But the stark challenge of climate change is pushing concerned States and humanitarian actors to burrow through legal and policy labyrinths to find ingenious ways to assure protection for the climate and disaster displaced.

Thus, in 2011-2012, Kenya and Ethiopia, drawing on the Organisation of African Unity (OAU) Convention governing the specific aspects of refugee problem in Africa (1969), accorded refugee status to Somalis fleeing a combination of drought, conflict and insecurity<sup>28</sup>. This was an implicit recognition of the complex, interacting drivers of displacement. Similarly, in the aftermath of the 2010 Haiti earthquake, Brazil and Mexico used their national refugee and migration frameworks to allow Haitians to enter and legally stay on a temporary basis<sup>29</sup>. Meanwhile, the various regional and sub-regional agreements for the free movement of people in Africa provide opportunities for disaster-displaced persons to access territory and exercise livelihood opportunities<sup>30</sup>. Therefore, due to the lack of a global compact on climate change-related displacement, harnessing existing treaties and agreements will be essential to afford a minimum level of protection to the climate and disaster displaced. Against the backdrop of the GCR, UNHCR has also recently initiated efforts to “strengthen implementation of refugee law-based international protection when cross-border movements occur in the context of nexus dynamics between conflict or violence and disaster or climate change”<sup>31</sup>. This may lead to the development of legal interpretive guidance, training and technical support to inform and promote the interpretation and application of the Refugee Convention and broader refugee criteria to such movements<sup>32</sup>.

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### Biographies

**Arjun Claire** • He has worked in humanitarian action for over eight years, and has a keen interest in protection and forced displacement issues. Arjun closely followed the development of the Global Compact on Refugees while working with the International Council of Voluntary Agencies. Arjun holds a Master’s of Advanced Studies in Humanitarian Action from the University of Geneva. He writes here in a personal capacity.

**Jérôme Élie** • His expertise on humanitarian affairs and forced displacement has been developed through over 15 years of experience within academia, the United Nations system and the NGO community, at headquarters and field level. Dr. Elie holds a PhD in International

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<sup>27</sup> Walter Kalin “The Global Compact on Migration...”, art. cit., p.3.

<sup>28</sup> Sanjula Weerasinghe, “In Harm’s Way. International protection in the context of nexus dynamics between conflict or violence and disaster or climate change”, UNHCR, December 2018. p.3-4.

<sup>29</sup> Sanjula Weerasinghe, “In Harm’s Way...”, art. cit., p.4.

<sup>30</sup> Tamara Wood, *The Role of Free Movement of Persons Agreements in Addressing Disaster Displacement: A Study of Africa*, PDD, May 2018, p.7-8.

<sup>31</sup> Sanjula Weerasinghe, “In Harm’s Way...”, art. cit., p.3.

<sup>32</sup> Sanjula Weerasinghe, “In Harm’s Way...”, art. cit., p.13-14

Relations and History from the University of Geneva. He has published in various journals, including the Refugee Survey Quarterly, Global Governance, and the Oxford Handbook of Refugee and Forced Migration Studies. He has closely followed the development of the Global Compact on Refugees over the past 3 years.

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