

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 6

2022

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Can the Principle of Non-refoulement trigger the Principle of Common but Differentiated Responsibilities in relation to Climate Refugees

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ABSTRACT

Climate refugee, the growing portion of refugees, is still given less importance in comparison with the other kinds of refugees, which is an extremely critical issue in the field of refugee law as well as human rights law. Unlike other kinds of refugees, climate migrants connect the spheres of refugee law, humanitarian law, environmental law, and human rights law owing to their very innate nature of emergence. By general definition, the part of refugees or the class of refugees who are forced to migrate unwillingly from their native land because of climate causes is known as climate refugees or climate migrants. Their emergence as refugees raises some very significant questions under the international legal framework. Among them, this article will discuss two important questions and try to come up with an answer to serve the purpose. One of them is whether the principle of non-refoulement will apply to them. The other is at what amount the states will be held accountable according to the principle of Common but differentiated responsibilities (CBDR), or if there can be a way of connecting these two principles to find a probable solution to the issue of climate migrants ,as ,in the upcoming days, this will be a severe migrant issue to face due to the drastic climate change and frequent occurrence of migration all around the globe.

Keywords: *Climate refugees, The principle of Non-refoulement, The principle of Common but differentiated responsibilities, Climate change*

I. INTRODUCTION

The latest Intergovernmental Panel on Climate Change (IPCC) report has strongly voiced Climate change's looming dangers. It will be too late if immediate cuts in greenhouse gases are not undertaken.³ However, the impacts of climate change are already being felt in different parts

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³ Delmotte, et al, IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA (2021).

of the world. Perhaps the most severe effects of climate change can be noticed in human migration.⁴ In the coming years and decades, many people will be displaced and forced to migrate due to the extreme weather events triggered by climate change.⁵ Some reports have even gone on to estimate that the number of displaced people may reach 1 billion by 2050.⁶ The number of people who are being replaced and will in the foreseeable future be displaced due to climate change is far more than displacement due to any other grounds mentioned in the Convention Relating to the Status of Refugees, 1951⁷. The flagship convention on protecting refugees is silent on the issue of displacement due to climate change. The fact that the way will not be applicable for displacement due to climate change and such displaced people will not legally qualify as refugees have been recently emphasized by the courts of New Zealand in the case of *Teitiota v The Chief Executive of the Ministry of Business, Innovation, and Employment*⁸. This position somewhat reflects the current position of the courts in different jurisdictions worldwide. However, in the aftermath of this case, Ioane Teitiota filed a communication with the UN Human Rights Committee alleging that New Zealand had violated his right to life under the International Covenant on Social and Political Rights by not granting him refugee status and removing him from Kiribati⁹. Although the committee held that Teitiota's removal to the Republic of Kiribati did not violate any rights under the Covenant¹⁰, they stated that the State parties to ICCPR have an obligation not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm which may be a violation of Articles 6 and 7 of the Covenant¹¹. This position reflects the principle of non-refoulement contained in the refugee convention and many other human rights treaties. As the fate of millions of people are displaced and at risk of displacement due to climate change in the near future are in a legal vacuum, it is imperative to evaluate the application of non-refoulement, one that is not restricted by the strict requirements of the refugee convention and one that tends to meet at one point with environmental law, thus creating a bridge between humanitarian and environmental aspects of international law.

⁴ Report from Working Group II to IPCC, Intergovernmental Panel on Climate Change, Policymakers' Summary of the Potential Impacts of Climate Change, Australian Government Publishing Service, (1990).

⁵ International Organization for Migration, Climate Change, Migration, and Critical International Security Considerations, (2011).

⁶ UNHCR, The State of the World's Refugees: In Search of Solidarity: A Synthesis. (2012).

⁷ Convention Relating to the Status of Refugees, 189 UNTS 137(1951)

⁸ 2013 NZHC 3125; 2014 NZCA 173; NZSC 107,(2015)

⁹ Ioane Teitiota v. New Zealand CCPR/C/127/D/2728/2016.

¹⁰ Jefferi Hamzah Sendut, "Climate change as a trigger of non-refoulement obligations under international human rights law," EJIL: Talk, (6 Feb.2020).

¹¹ The Refugee Convention, 1951.

II. APPLICATION OF THE PRINCIPLE OF NON - REFOULEMENT IN THE CLIMATE REFUGEE CRISIS:

The application of the non-refoulement principle with regard to climate refugees has been an undecided sphere of international law. Opinions are formed both in favor and against such application where It's subjected to fulfilling the requirements of applying this principle.

Until this point, every one of the cases has fizzled in light of multiple factors, among them that the harm feared didn't add up to "persecution" under the refugee Convention; there was no differential effect on the individual concerned, or the proof didn't yet validate the case¹². In any case, just right on time, in 2020, the United Nation Human Rights Committee acknowledged, on a fundamental level, that it is unlawful for states to send individuals to where the effects of environmental change open them to life-threatening gambles or savage, barbaric, or debasing treatment.¹³

International law does not offer a right of admission or continued residence for persons falling outside the scope of the CSR¹⁴. There are certain cases where human rights law, by analogy to the refugee law principle of non-refoulement, prohibits the return of certain persons¹⁵. The doctrine of non-refoulement has been enshrined in article 33 of the refugee convention. Since the prohibition on refoulement concerns only refugees, the definition of a refugee is also relevant for applying this rule. According to article 1(A) (2) of the Refugee Convention, a refugee is *“any person who is owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*

In International Refugee Convention, the standard of non-refoulement is the commitment of a state to forgo effectively sending (refouler) an individual to another state, where they may be

¹² Jane McAdam, Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement, 114 American Journal of International Law , 708, 708-725 (2020).

¹³ Human Rights Comm., Teitiota v. New Zealand, UN Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) [hereinafter Teitiota HRC]. Although the Committee's 'views', which will be referred to in this article as a 'decision', are not legally binding on States, they are grounded in international legal obligations that do bind States.

¹⁴ Joel Herrault, Refuge from Climate Change? The Principle of non-refoulement under the ICCPR and the ECHR in the Context of Climate Change Department of Law, Uppsala Universitet, Sweden, (2021).

¹⁵ Walter Kälin and Nina Schrepfer, UN High Commissioner for Refugees (UNHCR), Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches, (Feb.2012).

exposed to oppression as characterized by the CSR (see article 33 of the CSR.)¹⁶ In Human Rights law, this security is stretched out past the class of "outcasts" to any individual who may be exposed to an extreme infringement of Human Rights, like environmental exiles. We have seen that the CSR does not cover the environment-initiated movement. We are, in this manner, left with the choice of Human Rights Laws, which supplement the CSR by setting out the least guidelines of treatment and security commitments that are relevant whether or not an individual is viewed as an "outcast" in the expressions of the CSR.

The rule of non-refoulement is explicitly perceived worldwide in Human Rights treaties like the CAT¹⁷. Furthermore, most territorial and global Human Rights Convention, including the ICCPR and ECHR, have been understood by their particular observing bodies in the garb of forbidding non-refoulement.¹⁸ Together, they structure an arrangement of integral security intended to address what is going on in relation to people who fall outside the Refugee Convention yet who can't be eliminated by the ethicality of the standard of non-refoulement.

In principle, the non-refoulement principle in Human rights law could be set off by any Human right infringement.¹⁹ Notwithstanding, most privileges consider an adjusting of interests. Since sending states might have a particular interest in eliminating an individual not fitting the requirements for international protection or a residence permit, there need to be compelling reasons for the no non-refoulement principle to prevent removal. Hence, non-refoulement obligations most commonly arise if there is a real threat to certain civil and political rights, specifically the right to life or the prohibition of torture and CIDTP²⁰. Nevertheless, such obligations may also arise, in practice, where there are grave and/or accumulated violations of socio-economic rights, for example, violations of the right to health and the right to clean water. Violations of socio-economic rights of such kind could thus be labeled as a type of CIDTP, which would give rise to non-refoulement obligations.²¹ Accordingly, international protection could be granted where climate change effects severely harm civil and political or socio-

¹⁶UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, (Nov.1997).

¹⁷ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) United Nations, Treaty Series, vol. 1465, p. 85.(Dec.1984).

¹⁸ Vincent Chetail, *International Migration Law* (Oxford University Press 2020) 196. UN Committee on the Rights of the Child (CRC Committee) 'General Comment No 6 (2005); Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 Sept. 2005) UN Doc CRC/GC/2005/6, para 27; UN Committee on the Elimination of Discrimination Against Women (CEDAW) 'Communication No 33/2011 concerning MNN v Denmark' in 'Decision adopted by the Committee at its fifty-fifth session 8–26 July 2013' (15 Aug.2013) .

¹⁹ Jane McAdam, *Climate Change, Forced Migration and International Law*, Oxford University Press, p. 53. (2012).

²⁰ Id. p. 55.

²¹ Id. p. 54.

economic rights by applying the principle of non-refoulement or any other means.

III. DOES “COMMON BUT DIFFERENTIATED RESPONSIBILITIES” APPLY TO CLIMATE REFUGEES?

CBDR-RC has no scholarly contributions anywhere which stipulate linkages between the CBDR principles in the Paris agreement and migrations that are induced owing to climate change. But this debate is refutable on the basis that loss and damage are a part of adaptation as per United Nations considerations.²² So, in that sense, common but differentiated responsibilities can be applied in the garb of adaptation measures

with regard to climate-induced migration. Warsaw international mechanism²³ on loss and damage seems to be a justifiable option wherein implicitly, the parties promised to assist climate refugees based upon the “ability to pay principle.” The ability to pay principle under CBRD denotes **“those with the most ability to bear the costs should do so, such as wealthy states, companies, and individuals.”**²⁴ This eliminates the need to identify who caused the crisis and places obligations on those who are most privileged, advantaged, and wealthy.²⁵ Along with citing the Cancun decision, Kuusipalo (2017)²⁶ asserts that the UNFCCC also imposes an indirect obligation on wealthier nations to aid underdeveloped nations. Article 4(4) calls on wealthy states to help developing nations cover their adaptation expenses. . . negative effects. Developed countries should help developing countries, at the very least financially, if one views climate-induced migration as a negative effect.²⁷ Atapattu (2020)²⁸ concurs with Kuusipalo's viewpoint. She claims that when it comes to climate-induced migration, the CBDR-RC, the PPP, and theories of distributive and corrective justice, place specific obligations on big polluters. States that are being or will be most impacted would need aid from these entities. Meanwhile, the minimum that UNFCCC parties should provide, Under the Warsaw International Agreement, is compensation for climate refugees and that is sufficient as a system that will allow climate refugees to begin a new life. Additionally, the more they are able to do that, the more likely states are to accept the right of climate refugees, which might result in their

²²Robyn Eckersley, The Common but Differentiated Responsibilities of states to assist and receive ‘climate refugees.14(4) *European Journal of Political Theory*,481,481–500(2015).

²³ Id.

²⁴ Sally Ho, Eco Accountability 101: Who Should Pay For Fighting Climate Change & The Global Waste Crisis? *Green Queen*, (Mar 23, 2020).

²⁵ Id.

²⁶Rina 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(4) *Vermont Journal of Environmental Law*,614, 614–647, (2017).

²⁷ id. p. 639.

²⁸S. Atapattu, Climate change and displacement: Protecting ‘climate refugees’ within a framework of justice and human rights. 11(1) *Journal of Human Rights and the Environment*,86, 86-113, (2020).

general responsibilities to receive them.

IV. INVOCATION OF THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES AS A LOGICAL CONSEQUENCE OF THE DOCTRINE OF NON-REFOULEMENT

Prohibition on refoulement is one of the refugees' most essential rules in the legal regime. The principle of non-refoulement prohibits a state from expelling and turning back people seeking refuge to a place where they might be exposed to persecution or face any risk to their life and liberty. This rule does not obligate states to grant refugee status to anyone who does not meet the legal requirements, and states retain the right to decide whether they allow entry to aliens or deport an alien.

The protection of this rule is not dependent on the formal recognition of a refugee; instead, asylum-seekers are treated on the assumption that they may be refugees²⁹. Irrespective of that, the apprehension that the people seeking asylum have been displaced due to climate change might be enough to prompt immigration officials to abide by the prohibition of refoulement. However, the obligation of refoulement can be traced even outside the Refugee Convention. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Covenant on Civil and Political Rights (ICCPR), has provisions that give rise to this obligation. Thus, people displaced due to climate change may avail of this protection even though they are not granted legal protection under the Refugee Convention. In fact, in the Teitiota case, the Human Rights Committee has gone on to claim that the obligation not to extradite, deport, or otherwise, transfer pursuant to article 6 of the ICCPR may be broader than the scope of the principle of non-refoulement under international refugee law.³⁰ However, the Human Rights Committee has not ventured deeper into the implications and application of this right under the ICCPR. Even the traditional application of this rule has exceptions in regard to the security of the state, and not to mention also a prohibition on refoulement may provide temporary protection to the displaced people; in the long run their status and protection remain uncertain. Therefore, even if the prohibition on refoulement could be availed to people displaced due to climate change, it will be of minimal benefit if long-term solutions are not provided. Articles The United Nations Framework Convention on Climate Change provides for burden-sharing principles of equity

²⁹ UN doc. A/AC.96/815, paragraph 11(1993)

³⁰ Teitiota HRC para 9.3.

and common but differentiated responsibilities, which are applicable to apply to both mitigation and adaptation.³¹

Thus, it can be argued that in order to adapt to the impacts of climatic change, the principles of UNFCCC extend burden sharing even to the people displaced due to climate change³². Invocation of the principle of common but differentiated responsibilities could be inferred as a logical consequence of the application of the principle of non-refoulement. However, whether an obligation arising from instruments that do not deal with refugee protection and climate change could invoke further obligation under the climate change regimes is something to be pondered more and more.

V. CONCLUDING REMARKS

There are ample pieces of literature on the application of the principle of non-refoulement and the principle of common but differentiated responsibilities in climate change-induced displacement, but there is a scarcity of literature connecting both of these principles together. Kolmannskog and Trebbi discuss both principles as solutions for filling the gaps for the protection of the displaced people; but they have not linked the two principles³³. Though Mayer recognizes non-refoulement as a moral right for climate change refugees, he has postulated the principle of common but differentiated responsibilities in terms of financial burden, not in terms of sharing the burden of the refugee³⁴. They supported the concept of Funding which would enable countries to deal better with displacement, most of which is likely to go on being internal and regional in the developing countries.³⁵ As such, drawing a connection between the two principles was only partially possible till now. To connect the dots between these two principles, literature on the application of the principle of non-refoulement and the principle of common but differentiated responsibilities in climate change-induced displacement has been ventured via this paper³⁶ from which it can be said that if the principle of non-refoulement and the principle of CBDR could be merged in a proper manner not only in the context of sharing the financial issue but also sharing the burden of receiving climate refugees in proportion, as

³¹ United Nations Framework Convention on Climate Change, Article 3(1), 4(1) and 4(3), (1992).

³² Bierman F & Boas I, Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, 10(1), *Global Environmental Politics*, 60,76 (2010).

³³ Vikram Kolmannskog, Dignity in Disasters and Displacement: Exploring Law. In *Policy and Practice on Relocation and Return in the Context of Climate Context, paper prepared for the Global Environmental Change and Human Security Synthesis Conference, "Human Security in an Era of Global Change", University of Oslo, (22-24 June, 2009)*.

³⁴ Benoit Mayer, *The International Law on Climate Change*, p-216 i-ii, Cambridge University Press, (2018).

³⁵ Vikram Kolmannskog & Lisetta Trebbi, Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps, 92 *International Review of the Red Cross*, 713, 713-730 (2010).

³⁶ See Supra p -04-05.

described earlier in this paper³⁷, then it can solve the climate refugee problem in the long run. Though It's an arduous process to merge these two and to execute and apply, if done with honest intention by the world's leaders, it's a possible one. Climate change is such a phenomenon that no one can avoid. People who are facing this natural calamity belong to both first and third-world countries. Day by day, the number of climate refugees is growing with no possible solution, leaving the issue unsolved and burdening certain states with overpopulation with the absence of security and life maintenance for the refugees. In such a situation, the path to a long term solution presented in this paper could effectively serve the purpose. Its high time importance was given to this vital issue of climate refugees not only from a humanitarian approach but also from the world's inevitable consequences of climate change.

³⁷ See Supra p- 05-06.

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