



SUBMISSION BY THE INTERNATIONAL REFUGEE ASSISTANCE PROJECT TO THE U.N. SPECIAL RAPPORTEUR ON PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE

TAKING LEGAL ACTION ON CLIMATE DISPLACEMENT

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INTRODUCTION

Working to address climate displacement is central to the International Refugee Assistance Project's (IRAP) mission as a global legal aid and advocacy organization that empowers displaced people around the world who have been or are at risk of displacement to claim their legal rights, access freedom of movement, and secure a path to lasting refuge. Climate impacts such as extreme temperatures, drought, floods, wildfires, storms, and sea level rise are increasingly displacing people, disproportionately affecting marginalized populations facing other structural challenges in climate-vulnerable regions and countries.¹ In response to this challenge, IRAP launched our Climate Displacement Program in 2021 to use existing legal pathways—and establish a new legal framework—to help climate-displaced people move across national borders.

This submission focuses on the legal action needed in the United States, Mexico, Central America, and the Caribbean (“the region”) to ensure the protection of climate-displaced people moving within and across borders. The submission discusses existing legal mechanisms and proposes new forms of legal protection, recognizing that an equitable response to the climate crisis must support both communities who wish to stay in place and those who wish to and already are on the move.

¹ Ama Francis, “Global Southerners in the North,” *Temple L. Rev.*, https://www.templelawreview.org/lawreview/assets/uploads/2021/08/7.-Francis_For-Print.pdf.

THE NEED FOR LEGAL PROTECTION

Climate-displaced people do not qualify for special status or protection under existing international law due to climate impacts alone. Furthermore, there are no currently implemented domestic laws that comprehensively address climate displacement. As one expert notes, “existing international and regional mechanisms, laws and policies do not sufficiently address the challenge of cross-border displacement in the context of disasters.”² This leaves the individuals, families, and communities fleeing climate-related disasters like wildfires, hurricanes, and drought without adequate protection and pathways to safety.

Despite the legal protection gap, there are domestic legal tools as well as international and regional norms that governments can build upon to expand protection for climate-displaced people. Given that people are already on the move in the context of a changing climate, building legal frameworks that protect the rights and dignity of displaced people is imperative, especially since advanced planning can transform the move to a new country into a positive experience. Laws structure the ability of people to move across national borders and access safety and enjoy human rights within their own countries, making legal interventions especially important as part of a multi-pronged approach to tackling climate displacement.

Existing legal protection in the Americas³

Although no country currently grants a right of entry based on climate impacts alone, states across North and Central America and the Caribbean use various domestic and regional frameworks to respond to the reality of climate displacement. This submission discusses five mechanisms that currently exist in the region, while recognizing the importance of keeping regular migration pathways open and strengthening the humanitarian protection framework globally.

1. Humanitarian visas remain one of the most frequently used mechanisms by countries across the region to offer temporary protection in the aftermath of environmental disasters. Some countries have provisions in immigration law specifying that

² Walter Kälin and Nina Schrepfer, Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches, February 2021, <https://www.unhcr.org/4f33f1729.pdf>.

³ This section is adapted from IRAP’s “Advocacy Memo on Climate Displacement,” <https://refugeerights.org/news-resources/advocacy-memo-on-climate-displacement>.



environmental events may serve as the basis for a humanitarian visa.⁴ Generally, states require individuals to be facing serious or life-threatening conditions in their country of origin in order to qualify. Temporary protection based on humanitarian considerations typically includes temporary residence rights from six months to two years⁵, and in some cases, protection can be renewed as long as the conditions in the country of origin persist. Depending on the context, beneficiaries of humanitarian protection may be eligible for regular migration pathways and access to more permanent protection.⁶

One key benefit of the use of humanitarian visas in the context of environmental disasters and climate change is that they allow for entry and temporary stay. Mexico, Guatemala, and El Salvador expressly include environmental events within the scope of humanitarian considerations.⁷ Recently, several countries in South America, including Argentina,⁸ have integrated climate change or climate-related events in their legislation providing humanitarian protection to non-nationals affected by disasters. While the use of humanitarian visas in this context remains discretionary, humanitarian protection remains an essential tool to protect climate-displaced persons.

2. Temporary Protected Status (TPS) allows foreign nationals to access temporary protection in the United States due to conditions in a country that temporarily prevent the country's nationals from returning safely, which may include environmental or climate-related factors. The relevant statute provides three grounds for a TPS designation: (1) ongoing armed conflict; (2) environmental disaster; or (3) extraordinary and temporary

⁴ Ama Francis, "Global Governance of Environmental Mobility: Latin America & the Caribbean," *Sabin Center for Climate Change Law* (2021): 8, https://scholarship.law.columbia.edu/sabin_climate_change/36/.

⁵ Id.

⁶ Cantor, "Environment", 308.

⁷ Alex de Sherbinin, Susana Adamo, Ama Francis, Bryan Jones, & Briar Mills, "Climate Change and Its Impact on Urbanization in Mexico and Central America," (2021): 111, <https://doi.org/10.13140/RG.2.2.23109.58080>. Note that Costa Rica, Nicaragua, Panama, and Honduras do not expressly mention environmental disasters as grounds to provide protection under a humanitarian visa.

⁸ Government of Argentina, "PROGRAMA ESPECIAL DE VISADO HUMANITARIO PARA PERSONAS NACIONALES Y RESIDENTES," (2022) <https://www.argentina.gob.ar/normativa/nacional/disposici%C3%B3n-891-2022-364999/texto>; Government of Brazil, Migration Law (2017) 14. § 3; Government of Ecuador, Organic Law on Human Mobility (2017) Article 58; Government of Peru, Decreto Legislativo No. 1350, Ley y Reglamento de Migraciones (2017), art. 29(2)(k).



conditions. Unlike other mechanisms that are used after sudden-onset disasters, TPS can be applied to both sudden- and slow-onset events.⁹

That said, there are several limitations in the program's design that would require U.S. congressional action to modify. First, TPS applies to eligible nationals *who are already* in the United States when the designation goes into effect. Thus, TPS does not apply to individuals who arrive after the date of designation, resulting in the exclusion of many of those affected by a disaster.¹⁰ Second, the TPS statute also requires that a foreign government officially request TPS designation in cases of environmental disaster, which limits its application for nationals of countries without sufficient government will or capacity to request TPS.¹¹ However, it is possible that the third prong for "extraordinary and temporary conditions"—which does not require a request from a foreign government—can be used following an environmental disaster.¹² Third, TPS does not provide a pathway for citizenship, meaning that most TPS holders find themselves in a state of legal limbo.

Reforms to the TPS statute would offer broader protection for climate-displaced people by removing the requirement that governments request TPS designation in cases of "environmental disaster", removing the requirement that beneficiaries already live in the United States to qualify, and ensuring designation serves as a pathway to a more permanent status.¹³

3. The Cartagena Declaration defines a refugee as persons "who have fled their country because their lives, safety or freedom have been threatened by . . ." a "circumstance which ha[s] seriously disturbed the public order." This definition has been used in the past to offer protection to individuals displaced by environmental disasters, and thus serves as an important source of protection in the context of environmental disasters and climate

⁹ IRAP, "Opportunities to Address Climate Displacement in the U.S.," (2021): 5, <https://refugeerights.org/news-resources/u-s-opportunities-to-address-climate-displacement-august-2-2021>.

¹⁰ The White House, "Report on the Impact of Climate Change on Migration," (2021): 18-19, <https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf>.

¹¹ IRAP, "Opportunities," 19; 8 USC § 1254a(b)(1)(B).

¹² "Designation of Haiti for Temporary Protected Status," 86 C.F.R. 41863 (2010), <https://www.govinfo.gov/content/pkg/FR-2021-08-03/pdf/2021-16481.pdf>. For instance, the designation of Haiti in 2010 followed a 7.0-magnitude earthquake but was based on the "extraordinary and temporary conditions" in the aftermath of the disaster. Although earthquakes are not a climate-exacerbated disaster, this example is still relevant.

¹³ The White House, "Impact of Climate Change," 32.



change.¹⁴ For example, several countries in the region leveraged the Cartagena definition to admit Haitians fleeing the impacts of the 2010 earthquake.¹⁵ Mexico, Panama, Ecuador, and Peru recognized some Haitians as refugees based on the rise of political instability and generalized insecurity in Haiti after the earthquake. Significantly, countries granted protection based on the failure of Haitian institutions to protect nationals rather than on the basis of the earthquake itself.¹⁶ In countries that have adopted the Cartagena Declaration definition,¹⁷ future advocacy could focus on engaging with national immigration authorities to develop guidance and integrate climate change considerations in national refugee procedures.

4. Asylum law in the United States. To establish eligibility for asylum in the United States, an applicant must demonstrate that she is unable or unwilling to return to her home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁸ An applicant can thus rely on either past persecution or a well-founded fear of future persecution, and must show:

“(1) an incident, or incidents, that rise to the level of persecution [or a well-founded fear of such an incident]; (2) that is ‘on account of’ one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either ‘unable or unwilling’ to control.”¹⁹

¹⁴ Francis, “Global Governance,” 10.

¹⁵ Francis, “Global Governance,” 9; The Cartagena Declaration defines “refugees” also as “persons who have fled their country because their lives, safety 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.” Cartagena Declaration on Refugees § 3, (3), (1984), https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.

¹⁶ Cantor, “Environment,” 292.

¹⁷ Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Uruguay incorporate the expanded definition in their national legislation. Francis, “Global Governance,” 9.

¹⁸ 8 U.S.C. § 1101(a)(42)(A).

¹⁹ *Id.*



There are many instances where a person facing climate impacts may be eligible for protection, because of intersecting marginalization based on race, political opinion and/or other established grounds (see asylum case study).²⁰ However, eligibility for asylum under U.S. law remains narrow and requires a careful approach. Climate-related claims do not require an expansion of existing law, but rather consideration of how existing law applies in cases where climate impacts intersect with and compound persecutory government action or inaction based on established grounds. Many climate-displaced people will not qualify for refugee protection, but it is important not to leave behind those who do.

5. Legal frameworks protecting internally displaced peoples (IDPs). Given that much of climate displacement first occurs within national borders, strengthening national law and policy on IDPs to include climate change and environmental considerations would help protect the rights and needs of those fleeing environmental events within national borders.²¹ IDP frameworks may provide more permanent solutions for internally displaced nationals to access services and be part of a broader strategy to help relocate individuals before they are forced to migrate. In the United States, community relocation through an adaptive governance framework that integrates human rights principles may be the only feasible solution to permanently protect dozens of indigenous communities in the Arctic.²² Several states in Mexico and the governments in El Salvador and Guatemala have some form of law or policy governing the

ASYLUM CASE STUDY

Isabel is an Indigenous Honduran who led her tribe in resisting government officials' attempts to appropriate tribal land and natural resources in her coastal, climate-vulnerable community. Isabel's life soon came under threat. She was kidnapped, beaten, and sexually assaulted. Isabel escaped and gained asylum in the United States in 2020 on the basis of ethnic discrimination, political persecution, and membership in the particular social groups of environmental defenders, activists, and Indigenous leaders. Isabel's story demonstrates how climate change can heighten the risk of persecution in a paradigmatic asylum case.

²⁰ IRAP, "Opportunities to Address Climate Displacement in the U.S.," (2021): <https://refugeerights.org/news-resources/u-s-opportunities-to-address-climate-displacement-august-2-2021>.

²¹ Francis, "Global Governance," 21.

²² Robin Bronen, "Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine," *NYU Review of Law and Social Change* 35 (2011): 357.



protection of IDPs, with the state of Chiapas in Mexico addressing disaster-related mobility.²³ However, none of these countries has a specialized framework to manage internal displacement. Strengthening domestic frameworks to address internal displacement related to environmental events is critical to developing a rights-based response to climate displacement; doing so, however, should not be mutually exclusive from developing cross-border frameworks.

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Although these five mechanisms serve as important building blocks, a rights-based response to climate displacement requires envisioning new law. Recognizing that existing law still leaves protection gaps, the U.S. Government recommends, “creat[ing] a new legal pathway for individualized humanitarian protection...for individuals facing serious threats to their life because of climate change.”²⁴ While countries across the region utilize a variety of domestic and regional frameworks in order to facilitate the mobility of individuals or groups affected by climate-related disasters, more permanent and long-term solutions are necessary, especially in response to slow-onset disasters.

Key recommendations

Given the need to take legal action to protect the rights of people already on the move and those soon forced to do the same, in the context of climate change, we recommend the following:

- **Gather data:** There have been some early interventions by civil society organizations to learn more about how climate change undermines the rights of displaced people, but there is more to learn. For example, UNHCR could integrate data collection into the refugee status determination process, asking whether applicants have been impacted by a slow- or sudden-onset disaster in a country of asylum or country of origin, and then, publicly share the data.
- **Train adjudicators:** As noted by UNHCR, there are some instances where climate-displaced people are eligible for refugee status. Training adjudicators to recognize

²³ Francis, “Global Governance,” 6; Estado de Chiapas, “Ley para la prevención y atención del desplazamiento interno en el estado de Chiapas,” (2012)

<https://forodfi.cndh.org.mx/Content/doc/Normativo/Ley-DPI-Chiapas.pdf>.

²⁴ The White House, “Report on the Impact of Climate Change on Migration,” (2021): 18-19, <https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf>.



climate change's interaction with established protection grounds is critical to ensure that all eligible refugees are able to access protection.

- **Implement the Global Compact on Migration (GCM):** The GCM recommends a number of policy and legal tools that can be used to respond to people displaced by sudden- and slow-onset disasters, including humanitarian visas and private sponsorship. Countries should implement the GCM as a matter of priority, based on the protection needs across the spectrum of climate mobility, and the U.S. Government should establish a new protection pathway for climate-displaced people as the White House recommends.

About IRAP

The International Refugee Assistance Project (IRAP) is a global legal aid and advocacy organization working to create a world where refugees and all people seeking safety are empowered to claim their right to freedom of movement and a path to lasting refuge. Everyone should have a safe place to live and a safe way to get there. IRAP is working to expand legal protections for climate displaced people. Using existing legal tools and building on our expertise providing legal services to refugees and displaced people, as well as our work on legal advocacy and impact litigation, we will identify and advocate for pathways to safety for people displaced by climate change. For more information about IRAP's climate displacement work, contact Ama Francis at afrancis@refugeerights.org.