**Submission to the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change in response to the call for inputs on “Addressing the human rights implications of climate change displacement including legal protection of people displaced across international borders”**

Dr Lauren Nishimura

McKenzie Fellow

Melbourne Law School, University of Melbourne

The following submission focuses on question 7 of the Special Rapporteur’s call for inputs:

1. *What do you understand by the concept of “climate change refugee”? Do you think that the UN Refugee Convention should include a separate category for climate change refugees? How do you think this would work? What other legal options may be possible?*

There is currently no international legal agreement that specifically addresses the impacts of climate change and human mobility. There are several areas of international law that apply to the interaction between the two or that have been raised as potential protection frameworks for people on the move, including international refugee law. The understanding of refugee law and its role in the context of climate change continues to evolve, as does recognition of the social and economic forces that contribute to vulnerability and disasters.[[1]](#footnote-1) Others will likely discuss the limitations of the UN Refugee Convention and circumstances where a person could qualify for refugee protection. The aim of this input, however, is to offer another legal option, one that both enables proactive, anticipatory adaptive measures that help prevent displacement and facilitate safe, regular pathways for human mobility and that requires timely, ongoing international cooperation and support. This legal option results from the integration of positive duties from human rights law into the interpretation and implementation of adaptation obligations. Doing so concretizes these obligations, which helps guide and shape State adaptation efforts, and can lead to a requirement for States to take anticipatory action to ensure the enjoyment of rights. In some circumstances, such action will include measures to facilitate migration or relocation as a form of adaptation.

***Adaptation obligations:*** The UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement contain obligations related to adaptation. There are three types of adaptation obligations: obligations to act on adaptation, through planning and implementation; to assist in adaptation, financially and technologically; and to cooperate.[[2]](#footnote-2) These obligations are broad and their breadth allows for a range of activities to fall under their ambit. They have the potential to be a powerful legal tool because they can shape States’ adaptation efforts (including on mobility), empower people to help shape these efforts, and require international support. The UNFCCC and the Paris Agreement are also widely ratified treaties, which means that almost every State is obliged to take action, including on adaptation.

***Concretizing adaptation obligations:*** Adaptation obligations can be clarified by integrating human rights law into their interpretation. Integration is necessary, both because human rights law is part of the normative environment in which adaptation obligations operate and because it is required by treaty interpretation. A treaty must be interpreted in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose. The context includes a treaty’s text, preamble, and annexes. In addition, interpretation must take into account “any relevant rules of international law applicable in the relations between the parties”; this is also known as the principle of systemic integration.[[3]](#footnote-3) Together, these elements of treaty interpretation form the basis for interpreting adaptation obligations in light of human rights law.

The preamble of the Paris Agreement, for example, is part of the context for interpretive purposes. While not in itself creating new legal obligations, as part of the context the preamble can help add meaning to the treaty’s terms. The preamble recognises that “Parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights,” including the rights of migrants. This recognition reaffirms States’ commitments to take action that incorporates human rights and their existing human rights obligations. Other aspects of climate treaties also support the integration of human rights. For example, the Paris Agreement aims to enhance the implementation of the UNFCCC, in part by “increasing the ability to adapt” to climate change.[[4]](#footnote-4) The Paris Agreement’s article on adaptation—Article 7—sets out Parties’ commitments and elaborates on the purposes of adaptation. It explains that adaptation is a key component of responses to “protect people, livelihoods and ecosystems”. This aligns adaptation with the protective purposes of human rights law, to ensure conditions that allow people to live safely, with dignity and access to livelihoods and basic needs. These provisions also help establish the general relevance of human rights to climate action.

It is this relevance, in part, that necessitates the systemic integration of human rights law into the interpretation of adaptation obligations. The adverse effects of climate change affect a multitude of human rights. However, the risks to people and their rights differ across contexts. The impacts of climate change interact with other factors that include socio-economic, cultural, and political conditions; environmental risks; and individual and community vulnerabilities and preferences. As a result, the rights most relevant to interpretation will vary, which allows for adaptation measures to be tailored to a given place and time.[[5]](#footnote-5)

The operative principles of climate treaties further strengthen arguments for anticipatory action and support based on differentiation. These principles are both part of the interpretive context and guide interpretation and application of treaties’ provisions;[[6]](#footnote-6) they include precaution, equity, and common but differentiated responsibilities and respective capabilities (CBDRRC). For example, when applied alongside the integration of human rights, the precautionary principle reinforces the need to act to address foreseeable risks and better ensures positive duties are called upon to integrate human rights benchmarks and safeguards in planning and anticipatory action, in addition to remedial measures.

***Anticipatory action and adaptive mobility:*** While human rights obligations include both negative and positive duties—to act and to refrain from acting—the focus on State action is tied to their positive duties to protect and fulfil human rights.[[7]](#footnote-7) When relevant positive duties are integrated into adaptation obligations, they can help provide clarity and content, shaping what must be included in adaptation plans and policies. They also provide guidance on when such action is required: to address the foreseeable threats and risks posed by climate change.[[8]](#footnote-8) For human mobility, this means proactive, anticipatory action should be taken *before* people face or experience acute harm and are forced to move.

For example, when the adverse effects of climate change put access to food or clean water at risk, positive duties to ensure minimum essential levels of the rights to food or water are relevant.[[9]](#footnote-9) The right to life, and to enjoy a life with dignity, may also be relevant; to protect the right States have duties in certain circumstances to take “measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation”.[[10]](#footnote-10) Accordingly, an interpretation that integrates these relevant human rights duties requires States to undertake adaptation measures to ensure essential goods and resources when access to them is foreseeably put at risk. This translates into State duties to take certain proactive and preventive actions, which can result in a range of adaptation measures. These include efforts that address vulnerability and enable people to stay in place for as long as possible—through changes to infrastructure, policies, and the provision of resources. When these measures are no longer sufficient, and resources and rights are not accessible, then people will need to move. How such movement is undertaken—and supported—is critical to the experience of those affected.

Adaptive mobility is a proactive approach to mobility, which can help prevent displacement. With a legal basis in adaptation obligations and human rights duties, measures to plan for and facilitate such mobility puts people and their rights at the centre of climate action. Doing so enables State adaptation programmes to draw on the preventive role human rights can play, shifting the focus to the risks posed by climate change and the positive, anticipatory action needed to address these risks.[[11]](#footnote-11) This can lead to a variety of concrete measures, including adaptation planning that integrates human rights and human mobility; measures to facilitate adaptive mobility and support migrants; planning for and implementation of rights-based planned relocation; and the expansion of pathways for safe migration, free movement, and coordination of cross-border mobility.[[12]](#footnote-12) Integration of the duties that flow from procedural rights—access to information and participation—also requires that affected persons are provided with information and the opportunity to participate meaningfully in decision-making.

***Assistance and cooperation:*** Adequate support and financing are necessary to implement adaptation measures, including those to plan for and facilitate adaptive mobility. Cooperation and assistance are key features of climate treaties, which include adaptation obligations to cooperate and assist. These treaties also differentiate between those who must provide support and those who should be prioritized in assistance. For adaptation, developed countries are required to assist developing country Parties in their adaptation efforts.[[13]](#footnote-13) This is critical, as it requires those countries that have contributed to and benefitted most from the causes of climate change to provide support to those most vulnerable and who face the brunt of its impacts. As the UNFCCC establishes, such support is central to climate efforts: performance of developing countries’ obligations is dependent on “the effective implementation by developed country Parties of their commitments ... related to financial resources and transfer of technology”.[[14]](#footnote-14) It is also consistent with the CBDRRC principle, which places the onus on developed countries to take the lead in combating climate change.[[15]](#footnote-15)

The Paris Agreement makes clear that support for developing countries in meeting their adaptation obligations must be “continuous and enhanced”.[[16]](#footnote-16) Financial support, in particular, is required from developed country Parties.[[17]](#footnote-17) As with obligations to plan for and implement adaptation, human rights duties bolster the case that support for adaptation from developed countries is a legal requirement. For example, assistance and cooperation play an “essential role” in realizing of economic, cultural, and social rights, which “is particularly incumbent” on those States—namely developed countries—that have the ability to assist.[[18]](#footnote-18) Thus, when developing countries take adaptive measures to address foreseeable risks and ensure human rights, including by planning for and facilitating mobility, developed countries must provide support.[[19]](#footnote-19)

***Recent guidance from the Human Rights Committee****:* Finally, the importance of human rights to climate action, and the interaction between climate obligations and human rights law, is also highlighted by the Human Rights Committee. This bolsters arguments for integrating rights and proactive, anticipatory adaptation in at least three ways. First, the interpretive process outlined above has been accepted and recommended by the Committee. In *Billy et al. v Australia*, the Committee accepted the argument that climate obligations—including those on mitigation and adaptation—are relevant to interpreting States’ human rights duties.[[20]](#footnote-20) The argument to integrate human rights into the interpretation of adaptation obligations argues the same, in reverse. And both arguments align with General Comment 36, which recommends that obligations from international environmental law inform the content of the right to life, and vice-versa.[[21]](#footnote-21) Second, the Committee is increasingly emphasizing the need for a “precautionary approach” to satisfy rights obligations.[[22]](#footnote-22)

Third, and related to precaution, the timeliness of adaptation measures is key for adequate climate action. The Committee has pointed to a State’s delay in taking certain adaptive measures, “failure to adopt timely adequate adaptation measures”, and non-performance of positive obligations to implement adequate adaptation measures as violating human rights.[[23]](#footnote-23) These findings highlight the importance of taking proactive, anticipatory adaptation measures. Timing also played a role in the Committee’s findings that there was not yet a violation of the right to life—even where people face the prospect of losing their homes in the next 10-15 years—due to the possibility of States intervening and taking affirmative measures to protect people, including through relocation.[[24]](#footnote-24) Importantly, however, risks need not be imminent to trigger positive duties, and States must act to address foreseeable or reasonably foreseeable risks to rights.[[25]](#footnote-25) In the absence of such action and “robust national and international efforts”, the impacts of climate could trigger States’ *non-refoulement* obligations.[[26]](#footnote-26)

1. See, e.g., UNHCR, ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (2020); Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (CUP 2020). [↑](#footnote-ref-1)
2. See UNFCCC arts 4(1)(b), 4(1)(e); 4(3), 4(4), 4(5); Paris Agreement arts 7.9; 7.13, 9.1, 9.3. This input draws on Lauren Nishimura, ‘Adaptation and Anticipatory Action: Integrating Human Rights Duties into the Climate Change Regime’ (2022) 12 Climate Law 99, which describes some of the arguments that follow in greater detail. [↑](#footnote-ref-2)
3. See Vienna Convention on the Law of Treaties (VCLT) 1969 (1155 UNTS 331) art 31. Article 31 is also considered customary law. [↑](#footnote-ref-3)
4. Paris Agreement, art 2.1(b). [↑](#footnote-ref-4)
5. For an analysis of how integration could apply to the rights to life and to an adequate standard of living, see Nishimura (n 2). [↑](#footnote-ref-5)
6. See UNFCCC, art 3 (‘Parties shall be guided’ by the principles); see also Lavanya Rajamani and Emmanuel Guérin, ‘Central Concepts in the Paris Agreement and How They Evolved’ in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017) 82 (the Paris Agreement’s adoption under UNFCCC implicitly engages these principles). [↑](#footnote-ref-6)
7. While the focus here is on adaptation, the interpretive process and the integration of human rights also applies to obligations related to mitigation, which can help reduce and avoid adverse effects thereby preventing harm that contributes to displacement. [↑](#footnote-ref-7)
8. See below, ‘*Interpreting human rights law’*, and the Human Rights Committee (HRC), ‘General Comment No. 36: Article 6 (Right to Life)’ (2019) CCPR/C/GC/36 paras 7, 18. [↑](#footnote-ref-8)
9. See CESCR, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)’ (1990) E/1991/23 para. 10 (States have “minimum core obligations” to ensure “minimum essential levels” of economic, social, and cultural rights) ; see also Bruce Burson and others, ‘The Duty to Move People Out of Harm’s Way in the Context of Climate Change and Disasters’ (2018) 37 Refugee Survey Quarterly 379, 390–11 (discussing relevance of these core obligations in the context of disasters). [↑](#footnote-ref-9)
10. General Comment 36 (n 8) para 26. [↑](#footnote-ref-10)
11. For further discussion of the need for and benefits of the integration of human rights into climate obligations, see OHCHR, ‘The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants’ (2018) Conference Room Paper A/HRC/37/CRP.4 paras 144-150. [↑](#footnote-ref-11)
12. More concrete examples are included in Lauren Nishimura, ‘Adaptation Obligations and Adaptive Mobility’ (2022) Forced Migration Review <https://www.fmreview.org/climate-crisis/nishimura>. [↑](#footnote-ref-12)
13. See UNFCCC arts 4(3), 4(4). [↑](#footnote-ref-13)
14. Ibid. art 4(7). [↑](#footnote-ref-14)
15. Ibid. art 3(1). [↑](#footnote-ref-15)
16. Paris Agreement art 7.13. [↑](#footnote-ref-16)
17. Ibid. art 9.1 [↑](#footnote-ref-17)
18. General Comment 3 (n 9) paras 13-14. See also UN Charter arts 1(3), 13, 55-56; ICESCR art 2(1). [↑](#footnote-ref-18)
19. Further discussed in Nishimura (n 2); OHCHR (n 11) paras 151-158. [↑](#footnote-ref-19)
20. *Daniel Billy et al v Australia*, UN Doc. CCPR/C/135/D/3624/2019 (HRC 2022), paras 3.2 (authors cite VCLT article 31), 5.6, 7.5. [↑](#footnote-ref-20)
21. General Comment 36 (n 8) para 62. [↑](#footnote-ref-21)
22. Ibid.; *Billy et al.*, Annexes I, III (concurring and partially dissenting opinions). [↑](#footnote-ref-22)
23. *Billy et al.*,paras 8.12, 8.14. [↑](#footnote-ref-23)
24. Ibid. para 8.7; *Ioane Teitiota v New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (HRC 2019) para 9.12. [↑](#footnote-ref-24)
25. See General Comment 36 (n 8) paras 7, 62; *Billy et al.*, para 8.3; *Teitiota*, para 9.4; Michelle Foster and Jane McAdam, ‘Analysis of “Imminence” in International Protection Claims: *Teitiota v New Zealand* and Beyond’ (2022) 71 ICLQ 975 (warning against confusing the standard for admissibility, which includes imminence, with the merits, where imminence is not relevant to trigger State duties). [↑](#footnote-ref-25)
26. See *Teitiota*, para 9.9. [↑](#footnote-ref-26)