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Advocacy Memo on Climate Displacement

Key Legal Levers

November 9, 2022

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.

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I. Introduction

Climate impacts, such as extreme temperatures, drought, floods, wildfires, storms, and sea level rise, are increasingly displacing people. According to the United Nations High Commissioner for Refugees (UNHCR), an average of 20 million people are forcibly displaced to other areas in their countries by weather-related events every year.¹ Climate-related disasters disproportionately affect marginalized populations, who are often facing other structural challenges in climate-vulnerable regions and countries. For example, Latin American and the Caribbean countries demonstrate the strongest relationship between environmental hazards and migration outcomes in the world.² Supporting communities who wish to stay in place, while affirming international migration as an important adaptation strategy, is essential to building an equitable response to the climate crisis.

Existing international frameworks and regional and domestic legal regimes are currently insufficient to provide adequate protection to climate displaced people. In the Americas, individuals displaced by environmental disasters are typically not granted refugee status and are instead offered humanitarian visas or complementary protection.³ While these measures are important, their use is typically *ad hoc*, and on a discretionary basis in response to rapid-onset events. Humanitarian visas and complementary protection are generally not designed to provide permanent protection nor a pathway to permanent residence and citizenship. Thus, the protection response in the Americas is not specifically tailored to climate displaced people, who may not have a safe place to return to after temporary protection ends, especially if they were displaced by slow-onset disasters.

¹ UNHCR, "Climate Change and Disasters," accessed October 2, 2022, <https://www.unhcr.org/en-us/climate-change-and-disasters.html>.

² Roman Hoffmann, Anna Dimitrova, Raya Muttarak, Jesus Crespo Cuaresma & Jonas Peisker, "A meta-analysis of country-level studies on environmental change and migration," *Nature Climate Change* 10 (2020): 1–9, <https://doi.org/10.1038/s41558-020-0898-6>.

³ David J. Cantor, "Environment, Mobility, and International Law: A New Approach in the Americas," *Chicago Journal of International Law* 21 (2021): 263-266, <https://chicagounbound.uchicago.edu/cjil/vol21/iss2/3>.

Building out a more robust legal protection framework requires practitioners to understand the current landscape and assess what pathways or opportunities seem most promising in the short, medium, and long term. **This advocacy memo offers an overview of existing and potential levers at the regional and national level in the United States, Mexico, Central America, and the Caribbean (“the region”) that provide some legal relief to those displaced by climate change.** Leveraging existing protection and opening up new pathways, while centering the needs of the most vulnerable, is critical to address the challenges arising in the context of a changing climate.

II. Summary of Opportunity for Advocacy Ahead

While climate displaced people do not currently qualify for special status or protection under existing international law due to climate impacts alone, states across the region utilize a variety of domestic and regional frameworks in order to facilitate the mobility of individuals or groups affected by environmental disasters. This section will present the main mechanisms that currently exist in the region, and highlight legal gaps where new law is needed, discussing: **(1) humanitarian visas; (2) Temporary Protected Status; (3) the refugee definition in the Cartagena Declaration; (4) U.S. asylum law; (5) domestic frameworks for internally displaced people; and (6) permanent legislative solutions.** The discussion of these opportunities is not meant to be all encompassing, but rather serve as a starting point for developing possible solutions. In addition to the options identified, advocates should keep in mind the importance of keeping regular migration pathways open and strengthening the humanitarian protection framework across countries.

A. Short-term Solutions:

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 environmental or climate-related 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 years,⁵ 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

In the short term, advocates should promote the use of humanitarian visas in the context of environmental disasters since they allow entry and temporary stay. Mexico, Guatemala, and El Salvador expressly include environmental events within the scope of humanitarian considerations, while Costa Rica, Nicaragua, Panama, and Honduras do not expressly mention environmental disasters as grounds to provide protection under a humanitarian visa.⁷ Recently, several countries in South America have integrated climate change or climate-related events in their legislation providing humanitarian protection to non-nationals affected by disasters.⁸ 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) is one of the existing mechanisms in U.S. law that could provide immediate relief to climate displaced people who have left their home and are physically present in the United States. TPS allows foreign nationals to access temporary protection in the United States due to conditions in a country that

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>.

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).

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 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 congressional action to be modified. 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 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. Third, TPS does not provide a pathway for citizenship, meaning that most TPS holders find themselves in a state of legal limbo.

In the medium to long term, 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

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>.

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

B. Medium-term Solutions:

The following are existing solutions that can be leveraged with additional advocacy. Although most countries in the region already have an asylum framework and some countries have specialized frameworks for internally displaced people, additional work is needed to integrate climate change considerations into these frameworks.

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 a climate of accelerating and intensifying environmental disasters.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. However, the Declaration’s relevance may be limited in countries who did not originally adopt the non-binding agreement in 1984, notably the United States and many Caribbean islands. Regional mechanisms like the Caribbean

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.

Community (CARICOM) may be better suited to protect climate displaced people in the Caribbean in particular.

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

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. For example, climate-related drought may elevate racial discrimination to the level of persecution of Indigenous farmers in Guatemala. While the exact contours of climate-related claims remain an open legal question and there is an opportunity to explore and expand protections and legal mechanisms to include climate displaced people, advocates should be aware that eligibility for asylum under U.S. law remains narrow and requires a careful approach. Advocates should emphasize that 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.

5. Developing and strengthening domestic 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

¹⁸ 8 U.S.C. § 1101(a)(42)(A).

¹⁹ *Id.*

and needs of those fleeing environmental events within national borders.²⁰ 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.²¹ Several states in Mexico and the governments in El Salvador and Guatemala have some form of law or policy governing the protection of IDPs, with the state of Chiapas in Mexico addressing disaster-related mobility.²² However, none of these countries has a specialized framework to manage internal displacement. Salvadoran law expressly excludes environmental disasters from the protection framework. Thus, advocacy across the region with the participation of affected communities could strengthen domestic frameworks addressing internal displacement related to environmental events. Such a strategy should not be mutually exclusive from developing cross-border frameworks such as those mentioned above.

C. Long-term Solutions:

While existing mechanisms are useful, a long-term strategy requires a more comprehensive solution that addresses legal protection gaps.

6. Permanent legislative solutions are necessary to protect climate displaced people in the long-term. Although there are existing mechanisms that can be leveraged in the short- and medium-term to protect people after an environmental disaster, existing mechanisms such as humanitarian visas appear to be less available to persons displaced by slow-onset events.²³ While most domestic provisions do not expressly exclude individuals facing slow-onset events, and mechanisms like TPS in the United States can apply to slow-onset events, discretionary and *ad hoc* mechanisms seem to

²⁰ Francis, "Global Governance," 21.

²¹ 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.

²² 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>.

²³ Cantor, "Environment," 309.

have been applied for the most part in the aftermath of rapid-onset events in the region. Thus, a permanent legislative solution that is designed to address slow-onset events such as sea level rise, coastal erosion, or environmental degradation would provide broader protection to climate displaced individuals. U.S. Senator Markey and U.S. Representative Velasquez have proposed legislation that would create a national strategy to address global climate-driven displacement and provide the support needed to implement durable solutions for climate displaced persons.²⁴

Given that the United States, Mexico, Costa Rica, and Panama²⁵ are key receiving countries for climate displaced individuals in the region, advocates should consider prioritizing legislative solutions in these countries. Focusing on the United States along other countries is important given that restrictive migration policies in the United States can make other countries in the region desirable destinations.²⁶

Moreover, a legislative solution—which could include the creation of a special status or visa for climate displaced people—would codify protections in domestic law, providing a more permanent and comprehensive pathway in contrast to the current approach, which mostly operates on an ad hoc and discretionary basis. Although developing and passing legislative solutions will likely take years, it is essential that advocacy strategies consider the promotion of long-term solutions.

²⁴ Congress.gov. "S.1335 - 117th Congress (2021-2022): A bill to establish a Global Climate Change Resilience Strategy, to authorize the admission of climate-displaced persons, and for other purposes," April 22, 2021, <http://www.congress.gov/>.

²⁵ Sherbini et al, "Urbanization," 112 ("U.S. restrictive measures increase the desirability of Mexico as well as higher income countries such as Costa Rica and Panama as destinations. Indeed, some migrants from Honduras, Guatemala, and El Salvador already choose Mexico as a destination, rather than a transit country on the journey to the U.S. With that being said . . . environmental events like drought and flooding; limited economic growth, poverty, and inequality; urbanization and underinvestment in rural areas; violence and insecurity; and opportunities for high-earnings in the U.S. drive migration from Mexico and Central America") (citations omitted).

²⁶ *Id.*

III. Conclusion

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. Some mechanisms seem to work relatively well in the short term, such as humanitarian visas or TPS, while more permanent and long-term solutions will require advocates to think about new solutions, especially in response to slow-onset disasters.

In general, persons who are displaced as a result of slow-onset events appear to have fewer mechanisms available. In practice, several states will require a displaced person to identify the disaster warranting special immigration measures, effectively preventing people displaced by slow-onset events from applying for relief.²⁷ Another challenge stems from the fact that most mechanisms are triggered *after* a disaster has already taken place and thus, are often applied on a more *ad hoc* basis.

Advocates should also keep in mind how to push for more regular migration pathways for climate and other displaced people. Regular migration pathways can generally offer a more permanent status, allowing beneficiaries to remain in the country for a longer period of time, to study and work, and access public services, but may not respond to the needs of the most marginalized displaced people.

In short, advocates should consider the range of existing humanitarian frameworks and migration pathways that countries in the region can leverage to protect climate displaced individuals, understanding that increasing options for people to move *before* disaster strikes benefits both sending and receiving communities. While different strategies will be necessary depending on the context, a comprehensive response that increases protection for and pathways available to the individuals most affected by structural inequality and climate-related impacts is imperative.

²⁷ Cantor, "Environment," 309.