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Adaptation obligations and adaptive mobility

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Integrating relevant human rights duties into an understanding of adaptation obligations can provide a much-needed way to address gaps in current protection frameworks for people who move in the context of climate change.

The link between climate change and increased human mobility is widely recognised, as are the gaps in legal protection for people who move in the context of climate change. Current protection frameworks tend to rely on a specific category of person, apply only after people have moved or crossed State borders, and focus on forced migration or displacement. They do not, for example, apply neatly to movement associated with slow-onset events or environmental degradation. But there is another source of legal tools for addressing these gaps: the climate change regime, which includes the UN Framework Convention on Climate Change (UNFCCC), the Paris Agreement and the Conference of the Parties.

The UNFCCC and the Paris Agreement are widely ratified, and they contain a set of obligations on adaptation – what will be referred to here as adaptation obligations. These, in turn, offer a basis for addressing gaps in protection because they can help to guide and shape States' adaptation efforts (including on mobility), empower some of the most vulnerable people to help shape these efforts, and secure international support. However, adaptation obligations need clarifying and to be made concrete, and this can be accomplished through an interpretation that integrates human rights law.

Adaptation obligations

Three types of obligations related to adaptation can be found in the climate change regime: obligations to act on adaptation, through planning and implementation; to assist in adaptation, financially and technologically; and to cooperate.¹ These adaptation obligations are broad and ambiguous, in part by design as their breadth allows for a range of activities

and also leaves room for interpretation. Yet, although States can determine what activities they deem appropriate, they must still take action to satisfy these obligations. Much of the work on adaptation within the regime has focused on planning, including through National Adaptation Programmes of Action (NAPAs) and National Adaptation Plans (NAPs), but the need to move to implementation is increasingly urgent.

The rule on treaty interpretation provides a means to clarify adaptation obligations. Under international law, a treaty must be interpreted in accordance with the ordinary meaning of its terms in their context (the context being the treaty's preamble, text and any annexes) and in light of its object and purpose. In addition, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties".² This is also known as the principle of systemic integration. Together, these elements are the basis for interpreting adaptation obligations in light of human rights law.³

The preamble of the Paris Agreement, for example, includes recognition 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 language does not in itself create any legal obligations. However, it is a part of the context for interpretive purposes and can therefore help add meaning to the Agreement's terms. Interpretation also requires other elements of the rule to be considered. The evolving objectives of climate treaties and text of Article 7 of the Paris Agreement – its article on adaptation – bolster the need to include human rights. For example, the Agreement aims to enhance the implementation of the UNFCCC, in part



Community members in Sirajganj district in Bangladesh have worked to protect their land against river erosion, which has displaced many people several times.

through “increasing the ability to adapt” to climate change. Article 7 elaborates on the purposes of adaptation, including it being a key component of responses to “protect people, livelihoods and ecosystems”. This aligns adaptation with the protective purposes of human rights law, establishing its general importance and relevance.

It is the relevance of human rights law that necessitates its systemic integration into the interpretation of adaptation obligations. Climate impacts affect a multitude of rights, both in the immediate and longer term. Yet they occur in a context that includes geographical risks; socio-economic, cultural and political conditions; and community and individual vulnerabilities and preferences. Thus the rights most relevant to interpretation will vary, and the implementation of adaptation obligations can and should be tailored to the place and time.

Finally, the operative principles of the climate change regime also guide the interpretation and implementation of obligations. These principles are set out in Article 3 of the UNFCCC and include the precautionary principle, which calls for preventive action to avoid serious or irreversible harm and does not allow uncertainty as a reason not to act. When read alongside the integration of human rights, it reinforces the need to

act to avert or mitigate the foreseeable harm caused by climate change. Such an interpretation of adaptation obligations is the legal basis for adaptive mobility: a proactive approach to mobility that can help prevent or mitigate displacement, address the underlying conditions that contribute to vulnerability, and ensure people do not move to more fragile areas.

Adaptive mobility

When the positive duties associated with relevant human rights are integrated into an interpretation of adaptation obligations, they can help shape what must be considered and included in adaptation plans and policies. This interpretive process can lead to a requirement for States to take proactive, anticipatory action to ensure enjoyment of rights. In some circumstances, such action will include measures to facilitate migration or relocation as a form of adaptation. For example, when climate impacts put access to potable water or food at significant risk, positive duties to ensure access to a minimum essential level of the rights to water or food are relevant. Accordingly, an interpretation that integrates rights requires States to undertake adaptation measures to ensure access to basic resources. These can include measures that allow people to stay in place as long as possible, through changes to

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infrastructure and policies and the provision of resources. When these measures become insufficient, and resources and rights are no longer accessible, then people will need to move. How this mobility is undertaken is critical to the experiences of those affected.

Adaptive mobility requires planning and action to address foreseeable risks. Its basis in human rights puts people at the centre, and bolsters arguments that action must be taken preventively to ensure access to critical rights and resources. Likewise, integrating duties that flow from procedural rights – that is, access to information and participation – can translate into adaptation obligations to provide affected persons with information and the opportunity to participate meaningfully in decision-making. This is particularly important for any planned relocation, which is more likely to lead to better outcomes when affected persons are involved.

Adequate support and funding are necessary for implementing adaptive mobility. Within the climate change regime, the principle of “common but differentiated responsibilities and respective capabilities” puts the onus on “developed country Parties” to “take the lead” on climate action. And while differentiation between Parties’ obligations shifted in the Paris Agreement (for example, with the creation of Nationally Determined Contributions and the expectation that **all** Parties set emission reduction goals), for adaptation it remains largely intact. Developed countries are required to assist developing country Parties in their adaptation efforts. Support must be “continuous and enhanced”, as specified in Article 7 of the Paris Agreement, and, at a minimum, include financial resources.

Examples

The successful implementation of adaptation obligations – which have been clarified through the integration of human rights duties – would need: adequate time and preparation to ensure continued access to rights; participation of those affected before, during and after movement; monitoring of adaptation processes and measures; and

sufficient funding, support and access to resources. Some illustrative examples follow, along with suggestions of other ways forward.

Policies that seek to prevent, reduce or minimise harm from climate-related displacement: Bangladesh, for example, has developed a national strategy to manage disaster and climate-induced displacement. It identifies human rights as critical to such management, and suggests actions to reduce people’s vulnerability, including security of tenure, improved urban infrastructure and conditions, and when necessary, resettling displaced people to safer locations.⁴

Guidelines for and implementation of rights-based planned relocation: Fiji, for example, has developed planned relocation guidelines which describe a ‘pre-emptive’ approach to all stages of the relocation process and are explicitly linked to the Paris Agreement and human rights instruments.⁵

Coordination of cross-border mobility: This could occur through admittance into another State, expansion of visas, labour migration programmes or free movement agreements. These kinds of visas, programmes and agreements exist, and could: offer access to international territory; permit entry, stay and work; and allow for permanent or regularised status. However, they would need to be modified to ensure rights are protected and bureaucratic hurdles are reduced.

Integrating rights and mobility into adaptation planning: NAPs and other adaptation planning are a first step in facilitating adaptive mobility and accessing financing and assistance. They enable States to integrate adaptation into domestic planning and consider mobility as an adaptation strategy.

Support for adaptive mobility and migrants: A wide range of measures could provide such support, including facilitating transfer of remittances, assistance with securing land, and financial, technical or technological support.

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Conclusion

An anticipatory approach grounded in existing legal obligations provides a much-needed way to address gaps in current protection frameworks. Such an approach argues that rights should be rooted in State measures on, and support for, adaptation. This is accomplished by integrating relevant human rights and their positive duties into an interpretation of adaptation obligations. In certain circumstances, this will require States to enable adaptive mobility. Furthermore, because these obligations can compel action before people are forced to move, they offer a means to prevent displacement and precarious migration, and thereby to better

ensure that those who are most vulnerable are able to live in safety and with dignity.

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1. See, for example, UNFCCC Articles 4(1)(b), 4(1)(e); 4(3), 4(4), 4(5); Paris Agreement Articles 7.9; 7.13, 9.1, 9.3.
2. Vienna Convention of Law of Treaties (1969), 1155 UNTS 331, Article 31.
3. The process of interpreting adaptation obligations is described in greater detail in Nishimura L (forthcoming 2022) 'Adaptation and Anticipatory Action: Integrating Human Rights Duties into the Climate Change Regime', *Climate Law*, vol 12, 1-29.
4. *National Strategy on the Management of Disaster and Climate Induced Internal Displacement (NSMDCIID)* bit.ly/Bangladesh-strategy-disaster-2015
5. See article by Liam Moore in this issue.

