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Use of Force in Crisis: A Comparative Look at the Domestic and International Laws Governing the Use of U.S. Military Force to Respond to Mass Climate Refugee Migration

Holly Locke*

Abstract

Since the late 20th century, nations increasingly task their militaries with managing and responding to the influx of migration and refugees into sovereign nations. As a result, the U.S. military identified climate change to be a major security concern as the Department of Defense dedicates more resources to responding to this new class of refugee, among other climate related concerns. This paper explores the current scope of mass climate refugee migration and the role the U.S. military plays in responding to that migration. Specifically, this paper will explore the various legal frameworks, or lack thereof, of both domestic and international law that dictate how and when the military responds to climate refugees attempting to resettle on U.S. soil. Significantly, the U.S. Constitution vests the mobilization of the U.S. military in the U.S. Congress and the President, with great deference to any political agendas driving their decision making. Since, short of a constitutional amendment, there is no way to use hard law to change the structure of U.S. military mobilization, I advocate for the evolution of international and domestic soft law, and of public normative values to address aspects of mass climate refugee migration. This will encourage humanitarian responses focusing on climate refugees, rather than a security crisis.

Introduction

The movement of refugees and migration into sovereign nations is not a new phenomenon—it is an ancient societal pressure that has transformed civilizations, new and old.¹ Many of the reasons for migration have held

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1. Paul J. Smith, *Geography and the Boundaries of Confidence: Military Responses to the Global Migration Crisis: A Glimpse of Things to Come?*, 23 FLETCHER F. WORLD AFF. 77, 78 (1999).

steady over the advancement of civilization, from low earnings to lack of jobs, and scarcity of resources to persecution.² However, the world is experiencing a drastic increase in migration. In 1999, there were 125 million people around the world who could be classified as migrants.³ In 2017, the number of international migrants grew to 258 million worldwide, up from 200 million in 2010.⁴ The United States (“U.S.”) had more than 42 million immigrants residing on its soil in 2016, whereas there were just over 21 million residing in the U.S. in 2000.⁵ Of this growing population, this paper will focus on the issues surrounding migrants who are displaced people, specifically, those displaced by catastrophic weather disasters, or “climate refugees.”⁶ However, as will be explored further in this paper, the boundary for who constitutes a “climate refugee” is unclear. This is because the international community has not yet defined who are “climate refugees.” This lack of international definition exemplifies the fundamental issues facing this crisis: while there is growing evidence of an increase of people displaced by catastrophic weather and natural disasters, there is no formal system recognizing this group of people, and, therefore, no tailored solution to their mass migration.

In particular, this paper will examine the role that the U.S. military plays in responding to and mitigating the international movement of climate refugees onto U.S. soil. The relationship between the U.S. military and refugees is significant because, since the Cold War, nations rely on their militaries to control refugee migration into their respective countries.⁷ For example, during the 1994 Migration Crisis, the United States deployed thousands of U.S. Navy and U.S. Coast Guard personnel to intercept and rescue refugees at sea, and then transport them to refugee camps in Guantanamo Bay, Cuba.⁸ During this crisis, the Pentagon also established joint task forces to construct temporary migrant camps in Panama and Suriname.⁹ Around 7,000 U.S. troops contributed to assembling the Panama and Suriname camps, costing about \$50 million.¹⁰ More recently, in late-2018, the President of the United States ordered at least 5,500 U.S. active-duty troops to be stationed at the Mexico-U.S. border in response to

2. *Id.*

3. *Id.* at 77.

4. U.N. International Migration Report, Dep’t of Econ. and Soc. Aff., U.N. Doc ST/ESA/SER.A/404 (2017), <https://perma.cc/3VQD-SY9Y>.

5. U.S. Immigrant Population and Share over Time, 1850-Present, Migration Policy Institute (last visited, Oct. 24, 2018), <https://perma.cc/P8V3-CVFK>.

6. Tim McDonnell, *The Refugees the World Barely Pays Attention to*, NPR: GOATS AND SODA (June 20, 2018), <https://perma.cc/XVL2-FV6H>.

7. Smith, *supra* note 1, at 82.

8. *Id.* at 85.

9. *Id.* at 85–86.

10. *Id.* at 86.

a caravan of South Americans fleeing violence and poverty in their home countries, and planning to seek asylum in the United States.¹¹ This history exemplifies the mass scale at which the U.S. government invests in the military to control refugee movement onto U.S. soil.

Significantly, the response to mass refugee migration becomes more convoluted when the United States government does not formally recognize the cause of the displacement, specifically, climate change. Therefore, in Section I, I frame the scientific background causing climate refugee migration. I also explore the U.S. military's security concerns with climate change, as well as the political motivation of military deployment in response to mass migration, in general. After providing the political and scientific context to frame this issue, in Section II, I analyze the substantive concern of this paper—the actual laws governing when and how the United States uses its military force to manage the flow of incoming climate refugees. These frameworks include hard and soft law from domestic and international sources. Soft law incorporates agreements, principles and declarations that are not legally binding, typically found in the international sphere.¹² Hard law includes legally binding obligations, which are enforceable in court.¹³ This paper's analysis of hard and soft law will range from the U.S. Constitution to international treaties, and from U.S. military policy to international military tribunals. On top of identifying these laws, this section will identify the gaps in the established framework for addressing climate refugees.

Finally, Section III looks forward to where nations and the international community are developing climate change law and policies. This includes international laws currently in development to recognize climate refugees, including my recommendations for how we can develop these domestic and international laws to better address the relationship between military deployment and climate refugee migration. In particular, I argue that the international community can legitimize and normalize legal protections to climate refugees, encouraging a more humane response through internal Department of Defense policy when the executive branch calls for U.S. military force. This U.S. military policy may then influence the U.S. electorate's viewpoint on both refugees and climate change. Finally, the U.S. population's shift in normative values can influence military deployment policy within the domestic law framework, making it possible to provide a more humane use of force model to mitigate climate refugees movement into the U.S.

11. Lolita C. Baldor, *US Starts to Withdraw Troops from Trump Border Mission*, AP NEWS (Dec. 10, 2018), <https://perma.cc/K6Q4-7L7G>.

12. *ECCHR Glossary*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (last visited Jan. 19, 2019), <https://perma.cc/86GH-XTP8>.

13. *Id.*

I. The Current State of the Climate Refugee Crisis and the Political Views Shaping U.S. Military Deployment.

Before addressing the main question of the paper—what are the laws that govern U.S. military deployment in the context of mass climate refugee migration—it is first necessary to understand the environment in which this issue has arisen. This section will first explore who climate refugees are, why this migration has reached the level of a crisis, and what caused the crisis. Then, the second part of this section will outline the political context that influences the U.S. military’s response to climate change and refugees.

A. Climate Refugees – A Growing Class of Refugees Exacerbated by Climate Change

The mass movement of refugees can command national and international attention, leading to political consequences as nations struggle with how to respond to the influx of displaced people.¹⁴ Currently, out of the more than 65 million people displaced from their homes globally, the largest number since World War II, nearly 25 million of the displaced are refugees and asylum seekers living outside their own country.¹⁵ However, that number does not include people displaced by climate change.¹⁶ It can be difficult to produce an exact number of climate refugees because, “climate refugees” lacks any formal definition, recognition or protection under international law, even as the scope of the crisis becomes clearer among researchers and scientists.¹⁷ Currently, climate refugees are generally thought of as people who must leave their communities because of climate change and global warming related impacts.¹⁸ Climate change is caused by natural events as well as human activities.¹⁹ With that in mind, around 24 million people have suffered displacement due to catastrophic weather disasters each year since 2008.²⁰ As climate change continues to

14. See Katrin Bennhold, *Migration and the Far Right Changed Europe. A German Vote Will Show How Much*, N.Y. TIMES (Oct. 12, 2018), <https://perma.cc/K7NK-CNE5>; John Fritze & Christopher Schnaars, *President Trump Latches on to Migrant Caravan as Top Issue in Midterms*, USA TODAY (Oct. 25, 2018), <https://perma.cc/S232-UJWL>.

15. Somini Sengupta, *Climate Change is Driving People from Home. So Why Don't They Count as Refugees?*, N.Y. TIMES (Dec. 21, 2017), <https://perma.cc/38Q4-3W8T>.

16. *Id.*

17. McDonnell, *supra* note 6.

18. *Climate Refugees*, NAT'L GEOGRAPHIC (last visited Dec. 18, 2018), <https://perma.cc/DYD5-K9R3>.

19. *Id.*

20. *Global Internal Displacement Database*, INTERNAL DISPLACEMENT MONITORING CTR. (last visited Oct. 25, 2018), <https://perma.cc/9VMZ-HKWG>.

make storms and droughts more frequent, migration experts and climate scientists expect that number to rise.²¹

However, catastrophic weather disasters are not the only climate change-related issue displacing people. Climate impacts that unravel over time, such as desert expansion and sea-level rise, also force people from their homes.²² A March 2018 World Bank report projects that long-term climate change impacts could displace 143 million people by 2050, with sub-Saharan Africa, South Asia and Latin America projected to be the most vulnerable regions.²³

Climate refugee classification becomes even more complex when climate change is not the primary reason for the migration but aggravates or intensifies other catastrophic events. The complex consequences that climate change has on nations can perhaps be best exemplified by the recent civil unrest and war in Syria. In Syria, climate change has likely multiplied risks and, consequently, deteriorated an unstable geopolitical situation.²⁴ Prior to the Syrian Civil War, a pattern of increased dryness in the Middle East led to a drought affecting sixty percent of Syria's land, for which scientists hold climate change partly responsible.²⁵ Syria's available water resources decreased by fifty percent between 2002 and 2008 due to human mismanagement and environmental conditions.²⁶ The drought had a particularly devastating effect in the country's northeastern region, distressing the livelihood of 800,000 farmers and herders, and pushing two to three million people into extreme poverty.²⁷ The Huffington Post labeled these devastated Syrians as "climate refugees."²⁸ These domestic climate refugees abandoned their homes and migrated to temporary settlements on the outskirts of areas like Aleppo, Damascus, Hama and Homs as a result of the drought.²⁹

Yet, their classification is complicated because the farmers, who previously had to move because of a drought, faced further turmoil due to political unrest. The movement of these domestic climate refugees placed an extraordinary strain on Syria's economically depressed cities.³⁰ Job

21. McDonnell, *supra* note 6.

22. *Id.*

23. Kanta Kumari Rigaud et al., *Groundswell: Preparing for Internal Climate Migration*, WORLD BANK (2018), <https://perma.cc/2ZQD-LFBG>.

24. Gregg Badichek, Note, *The Threat Divider: Expanding the Role of the Military in Climate Change Adaptation*, 41 COLUM. J. ENVTL. L. 139, 144–45 (2016).

25. Charles B. Strozier & Kelly A. Berkell, *How Climate Change Helped ISIS*, THE HUFFINGTON POST: THE BLOG (Sept. 29, 2014), <https://perma.cc/AP6Y-WP7B>.

26. Badichek, *supra* note 24, at 144–45.

27. Strozier & Berkell, *supra* note 25.

28. *Id.*

29. *Id.*

30. Badichek, *supra* note 24, at 144–45.

competition skyrocketed in tandem with competition for potable water.³¹ This was compounded “by governmental mismanagement and apparent indifference, further ripening the likelihood of cascading civil unrest and, ultimately, civil war.”³² In fact, some of the climate refugees settled in Daraa, where protests in early 2011 fanned out and eventually ignited into a full-fledged war.³³ As a result, The Pew Research Center estimates that the ongoing, eight-year Syrian Civil War has so far displaced thirteen million Syrians.³⁴ An estimated 21,000 Syrian refugees have resettled in the U.S.,³⁵ with the U.S. granting asylum to just over 300 Syrians between 2012 and 2016.³⁶

In summary, climate change can contribute to a greater catastrophic event, like war, that is compounded by other factors, such as governmental mismanagement and political unrest. It is therefore nearly impossible to neatly separate one cause from another. As will be explored further in Section II, this sort of complex situation, where multiple factors contribute to refugee displacement, is why the international community has struggled to define “climate refugees.”

Despite this particularized case study of Syria, the influx of refugees is not tied to just one geopolitical event. In a Columbia University study, climate researchers projected that if global temperatures continue their upward march, applications for asylum to the European Union could increase twenty-eight percent to nearly 450,000 per year by 2100.³⁷ As discussed above, the issues climate refugees face are multifaceted—suffering from different levels of climate change causation and devastation. The causation ranges from intense catastrophic weather events to long term droughts and erosion. These events can destroy homes, diminish resources, and contribute to political instability leading to the rise of terror groups. Regardless of where the climate refugees migrate from, the number of refugees that are displaced at least partially by climate change impacts is rising, and this is a pressing problem that both the United States and the international community need to address.

31. *Id.*

32. *Id.*

33. Strozier & Berkell, *supra* note 25.

34. Phillip Connor, *Most Displaced Syrians Are in the Middle East, and About a Million Are in Europe*, PEW RES. CTR. (Jan. 29, 2018), <https://perma.cc/6BZ4-BEKU>.

35. *Id.*

36. *Asylum Statistics FY 2012 – 2016*, U.S. DEP’T OF JUST. EXECUTIVE OFF. FOR IMMIGR. REV. OFF. OF PLAN., ANALYSIS, AND TECH. IMMIGR. CTS. (last visited Oct. 26, 2016), <https://perma.cc/C685-HHJT>.

37. McDonnell, *supra* note 6.

B. The U.S. Military's Views on Climate Change Are at Odds with the President's

Despite the overwhelming numbers manifesting from the devastating impact that climate change has on the global community, such as the growing quantity of climate refugees, current federal U.S. policy has an inconsistent approach to climate change, sometimes even discrediting this threat.³⁸ However, as the previous section explored, there is an observable connection between climate change and political instability. Allies to the United States have attempted to emphasize the negative connection that climate change has on national security. Federica Mogherini, the European Union's high representative for foreign affairs and security policy, noted that “. . . when you invest in development, when you invest in the fight against climate change, you also invest in our own security.”³⁹ European officials have even pushed back on spending more on defense, saying their investments in boosting resilience to climate hazards in poor regions of the world are as valuable to maintaining security as strong military forces.⁴⁰

The U.S. administration has, at times, mirrored these same concerns of European nations. Former Secretary of Defense James Mattis stated that climate change is real and a threat to American interests abroad.⁴¹ Mattis' expressed this view at his confirmation hearing in January 2017, where he noted how drought in global trouble spots can pose challenges for troops and defense planners.⁴² He also stressed the immediacy of the issue and did not treat the consequences of climate change as “some distant what-if.”⁴³ In written answers to the confirmation hearing committee, Mattis said that climate change is impacting stability in areas of the world where our troops are operating today, and it is appropriate for the Combatant Commands to incorporate into their areas of planning the drivers of instability that impact the security environment.⁴⁴

Mattis' views earn attention because they can be seen as “at odds with the views of the [P]resident who appointed him and many in the

38. See generally Jean-Daniel Collomb, *The Ideology of Climate Change Denial in the United States*, 9 EUROPEAN J. OF AMERICAN STUDIES, Spring (2014) (“The concerted effort to discredit the scientific consensus over man-made global warming has been continuing for two decades in the United States, and shows no sign of weakening.”), <https://perma.cc/8DBR-VQT4>.

39. *Speech by Federica Mogherini at the Munich Security Conference*, EUR. UNION EXTERNAL ACTION (Feb. 02, 2017), <https://perma.cc/RRG9-D8DC>.

40. Andrew Revkin, *Trump's Defense Secretary Cites Climate Change as National Security Challenge*, PRO PUBLICA (Mar. 14, 2017), <https://perma.cc/4VU4-JC83>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

administration in which he serves.”⁴⁵ Yet, the U.S. military does have a history of acknowledging the reality, threat, and imminence of climate change. For example, in 2010, the Department of Defense issued its Quadrennial Defense Review, concluding that climate change would have significant geopolitical impacts that could “weaken fragile governments,” “increase the spread of disease,” and “spur or exacerbate mass migration.”⁴⁶ In 2014, the military confirmed this position, calling the effects of climate change on resource scarcity “threat multipliers.”⁴⁷

The armed forces have already felt the immediacy of this threat. Even though the Navy has a long history of responding to weather-related catastrophes, the global surge in extreme weather and climate-related civilian unrest has led to more requests for assistance from the Navy.⁴⁸ Military insiders, like Ann C. Phillips, have expressed concern that “[t]he demand could hamper naval readiness.”⁴⁹ Notably, Phillips is a retired rear admiral who spent thirty years in the Navy and is now a member of the Center for Climate & Security advisory board, a non-partisan think tank.⁵⁰ “If you’re doing a humanitarian response, you are not doing in all likelihood the mission that you’re supposed to be—whether that is training, preparing to deploy or actually being on deployment,” Phillips said.⁵¹

Additionally, human rights and immigrant advocacy groups are concerned that military force is not the appropriate tool to respond to migration and refugee movement.⁵² In April 2018, President Trump demanded that the military be deployed to guard the border in response to a migrant caravan moving northward toward the Mexico-U.S. border.⁵³ He stated that “he wanted active-duty armed troops to do what immigration authorities could not.”⁵⁴ After discussions with Mattis, the President requested the mobilization of hundreds of National Guard personnel to serve in support roles instead.⁵⁵ Later, during the October 2018 migrant caravan, Trump suggested that if migrants threw rocks at the troops

45. *Id.*

46. Sarah E. Light, *Climate Change and National Security*, THE REG. REV. (Dec. 7, 2015), <https://perma.cc/Q7EM-WSWZ>.

47. *Id.*

48. Gerald Harris, *Trump’s Skepticism Aside, the Navy is Taking Climate Change Seriously*, USA TODAY (June 28, 2018), <https://perma.cc/4QZ5-K9U9>.

49. *Id.*

50. *Id.*

51. *Id.*

52. Julie Hirschfeld Davis & Thomas Gibbons-Neff, *Trump Considers Closing Southern Border to Migrants*, N.Y. TIMES (Oct. 25, 2018), <https://perma.cc/3UR4-SK5N>.

53. *Id.*

54. *Id.*

55. *Id.*

stationed at the border, the troops might “open fire.”⁵⁶ Human rights and immigrant advocacy groups, such as Human Rights First, condemn President Trump’s use of the military to mitigate migrants movement.⁵⁷ The group called Mr. Trump’s response to the caravan “a callous and politically motivated attempt to instill fear in American voters by fabricating a sense of crisis in the run-up to the midterm elections.”⁵⁸

This political and historical background shows the importance of legal framework informing the use of U.S. military force in response to climate refugees. As I will discuss further in the next section, the current framework is highly deferential to the political leanings of whoever occupies the U.S. presidency and without safeguards, can lead to a conflict in the use of military resources, and have an inhumane and demeaning impact on migrants and refugees.

II. The Domestic and International Laws Governing the U.S. Military Response to Climate Refugees, or Lack Thereof

A. The U.S. Constitution Is the Law of the Land, but Congress and the President Often Grant the U.S. Military Greater Latitude than Any Other Federal Department

The various powers of war are ultimately vested in the president and the Congress by the U.S. Constitution, which includes the decision of when to mobilize troops to intercept incoming climate refugees. However, the Executive and Legislative branches allow great deference to the U.S. military to set internal policies to address security concerns, including allocation of resources for climate change and humanitarian aid. This section will discuss these domestic hard and soft laws controlling military use of force to climate refugees through the constitutional power vested in the President and Congress, and the internal policies set by the military concerning humanitarian aid.

The basic law underlying the mobilization of troops for any purpose is the war powers vested in Congress and the president by the U.S. Constitution. The U.S. Constitution grants Congress the power to declare war.⁵⁹ Meanwhile, the President derives the power to direct the military after a Congressional declaration of war.⁶⁰ While the chain of command is clear in theory, in practice, minimal legal precedent and structure provides little practical boundaries of the implementation of war powers. Instead the

56. Christal Hayes, *Migrant Caravan: Trump Suggests Immigrants Could Be Shot If They Throw Rocks at Military*, USA TODAY (Nov. 1, 2018), <https://perma.cc/3MRU-FCP2>.

57. Davis & Gibbons-Neff, *supra* note 52.

58. *Id.*

59. U.S. CONST. art. I, § 8, cl. 11.

60. U.S. CONST. art. II, § 2.

political motivations of whomever is the current Commander-in-Chief drives the implementation of the powers, including when to deploy troops to intercept refugees.⁶¹ Various pieces of legislation over the years have attempted to define and curb when the President can deploy troops, both domestically for security issues and internationally for humanitarian aid.

The October 2018 deployment of troops to the Mexico-U.S. border in response to a migrant caravan has provided a recent example of exactly what power authorizes the president to deploy troops domestically in response to refugees attempting to enter the country. These events are especially controversial because of the Possee Comitatus Act, a 140-year-old-law that bars the president from using the active-duty military within U.S. boundaries.⁶² However, Congress created a few exceptions to the Act over the years, including allowing the president to use the military to halt armed insurrection and to help recover weapons of mass destruction on U.S. soil.⁶³

In an April 2018 report, the Congressional Research Service examined the president's authority to deploy the armed forces to secure the border, and found that the armed services do not appear to have a direct legislative mandate to protect or patrol the border or to engage in immigration enforcement.⁶⁴ However, Title 10 of the U.S. Code does allow general legislative authority for the armed services to "provide certain types of support" to federal, state, and local law enforcement, such as sharing intelligence and providing advice.⁶⁵ Any interaction with migrants at the border would be as a result of "incidental contact."⁶⁶

Yet, a few days prior to the October 2018 deployment, a senior Defense Department official said the precise legal authorities under which Mattis would order the deployment "were still being ironed out by administration lawyers."⁶⁷ Also, the official noted that President Trump's reference to the term "national emergency" in connection to the caravan was significant, because it allowed wider latitude to send active-duty troops under existing legal authorities.⁶⁸ This shows that certain pieces of

61. To note, since "climate refugee" has not received its own classification in the international community or in U.S. law, this paper will look at how these powers and deployments affect refugees in general.

62. Alan Gomez, Bart Jansen & David Jackson, *Trump Wants Up to 15,000 Troops at Border to Deal with Migrant Caravan. Political Stunt or National Emergency*, USA TODAY (Oct. 31, 2018), <https://perma.cc/K56V-TVF7>.

63. *Id.*

64. Jennifer K. Elsea, *The President's Authority to Use the National Guard or the Armed Forces to Secure the Border*, CONG. RES. SERV. 3 (Apr. 19, 2018), <https://perma.cc/6RS3-ZZA6>.

65. *Id.*

66. Gomez, Jansen & Jackson, *supra* note 62.

67. Davis & Gibbons-Neff, *supra* note 52.

68. *Id.*

legislation clarify when and where the president can deploy troops, especially regarding domestic deployment in response to large groups of refugees wanting to enter the country. Alternatively, it also exemplifies that political agendas are typically what drive the decision for deployment, and the legal authority for deployment is determined later on.

Similarly, Congress often allows the president great leeway from Congress when deciding to deploy troops to international waters to intercept incoming refugees seeking to enter the U.S. and other humanitarian interventions because existing legislation is not always clear on the boundaries of this power. The most commonly cited authority for these types of missions is 22 U.S. Code § 2388.⁶⁹ The code says nothing about natural disasters, humanitarian intervention, or even the military.⁷⁰ It merely authorizes the president to deploy personnel to assist an international organization.⁷¹ Further, the president determines what action is consistent with and in furtherance of the purpose of this Act.⁷² As Stephen Dycus, a Vermont Law School professor who studies national security and environmental law, notes, this “murky” statutory authority means “the predictability of our response is a mess.”⁷³

To summarize, federal law has undefined boundaries controlling when, how, and why the president should send military forces abroad during a humanitarian crisis or deploying troops domestically to secure borders. It is also noteworthy that the two circumstances frame refugee migration differently: deploying troops to international waters to intercept refugees comes from humanitarian aid authority; whereas, deploying troops domestically to secure borders is a result of security authority.

Once these commands are given, the military will undertake such actions in response to congressional directives and presidential executive orders, but the military will also take voluntary steps in response to its own internal battlefield and national security needs.⁷⁴ As a result of the uncertainty from the president’s broad war power, and the potential for confusion and political debate, the military issued a joint publication in January 2014 laying out the principles of when and how it should provide humanitarian aid.⁷⁵ For example, the document addresses the United Nation (U.N.) endorsed humanitarian principles of humanity, neutrality,

69. *Uncle Sam Wants You to Stop Denying Climate Change*, NRDC: ONEARTH (Oct. 30, 2014), <https://perma.cc/8487-9SKL>.

70. *Id.*

71. *Id.*

72. 22 U.S.C.S. § 2388.

73. *Uncle Sam*, *supra* note 69.

74. Sarah E. Light, *The Military-Environmental Complex*, 55 B.C.L. Rev. 879, 879 (2014), <https://perma.cc/PV9U-YDWL>.

75. *Uncle Sam*, *supra* note 69.

and impartiality.⁷⁶ It states that these principles are important in establishing and maintaining access to affected populations, whether in the context of a natural disaster, an armed conflict, or a complex emergency.⁷⁷ There is also international military case law that echoes similar sentiments about the importance of applying humanitarian principles to displaced people. In case number 10 of the Nuremburg Proceedings, also known as the “Krupp case,” the U.S. Military Tribunal emphasized that even if a nation has the legal authority to deport a displaced person who has entered its borders, the deportation becomes illegal whenever generally recognized standards of decency and humanity are disregarded.⁷⁸ Consequently, while domestic law controls the deployment of U.S. military force, international laws are taken into consideration for how humanitarian assistance is executed by the military. Therefore, it’s necessary to also examine the international framework directing use of military force for climate refugees.

B. While International Law Provides a Robust Framework for Refugee Response, ‘Climate Refugees’ Currently Lack Any Formal Definition, Recognition or Protection Under International Law

As mentioned in Section I, there is no formal definition of “climate refugee” within the international framework and thus, those forced to migrate as a result of climate change do not have the same protection that the other established classifications of refugees possess. Since the language concerning “climate refugees” is mostly undefined, this paper examines the laws that govern military deployment in broader categories that climate refugees may fall under, such as humanitarian aid and general refugee aid. Examining this more general refugee category is relevant because climate change might only be one part of what forces a person to seek asylum in another country, such as seen in the situation in Syria, and they may qualify for other refugee protections. Also, examining this language can help identify where a climate refugee designation might eventually fit into the existing international legal framework.

The primary international law authority on refugees is the Refugee Convention of 1951, a U.N. multilateral treaty which sets out the rights refugees have when fleeing their own country on asylum.⁷⁹ As mentioned, climate refugees do not possess rights under this Convention, because they

76. JP 3-29, *Foreign Humanitarian*, JOINT CHIEFS OF STAFF, I-3 (Jan. 3, 2014), <https://perma.cc/9XDQ-URJU>.

77. *Id.*

78. Customary International Humanitarian Law, Int’l Committee of the Red Cross (last visited Dec. 21, 2018), <https://perma.cc/ZR9N-HHN3>.

79. Yvonne Su, *Should We Bring Back ‘Climate Refugees’?*, 6 OXFORD MONITOR OF FORCED MIGRATION 22, 28–29 (June 2016).

do not fulfil the requirements of being a refugee as stated in Article 1A.⁸⁰ To be afforded protection under existing laws, climate refugees must show they are fleeing a war zone or face a fear of persecution if they return home.⁸¹ This classification is important because the U.S. Field Manual (1956) explains that, under international law, refugees have a right to international protection and assistance where it is not available from their national authorities.⁸² Humanitarian protection is an important subsidiary right that gives meaning and effect to the core rights of protection and assistance.⁸³ The field manual also states that humanitarian access is a right of refugees.⁸⁴

International law understands humanitarian aid as a human right, and nations like the U.S. also have an interest to mitigate the flow of migrants for security reasons. However, the international framework determining when troops may be used in these situations can be outdated, requiring evolution and revision from the U.N. Humanitarian assistance is outside the traditional international justifications for the use of force as envisioned by the U.N. Charter, and as envisioned by congressional restrictions outlined in the War Powers Resolution (WPR) for the president.⁸⁵ As a result, the president's constitutional foreign relations powers are increasingly interconnected with U.N. authorization, as the increased demand for humanitarian aid continues to stress and test evolving international norms regarding the authorization of military force.⁸⁶

Part of the issue is that "threat" is not well defined within the U.N. Charter, which affords wide discretion in defining what constitutes a "threat to international peace and security."⁸⁷ Instead of a clear definition of "threat," Article 43 of the U.N. Charter states that member states will make available "armed forces, assistance, and facilities . . . for the purpose of maintaining international peace and security."⁸⁸ The definition continues to evolve and expand from its historical origins, as the U.N. Security Council has shown increasing willingness to address the root cause of conflict that is behind humanitarian crises.⁸⁹ Consequently, the deference given to the U.N. in determining when the use of military force in responding to humanitarian needs is appropriate, mirrors a similar

80. *Id.*

81. Sengupta, *supra* note 15.

82. Customary International Humanitarian Law, *supra* note 78.

83. *Id.*

84. *Id.*

85. Mark Nevitt, *The Commander in Chief's Authority to Combat Climate Change*, 37 CARDOZO L. REV. 437, 442-43 (2015), <https://perma.cc/YX4Y-CA7T>.

86. *Id.*

87. *Id.*

88. *Id.* at 495.

89. *Id.* at 442-43.

deferential framework of when the president can deploy U.S. troops for security concerns. In both instances, the decision to not explicitly include climate refugees in the international law frameworks is discretionary, and, therefore, susceptible to political agendas.

The main issue of creating new climate refugee protections is not because the international community refuses to acknowledge climate change. Instead, many worry that if renegotiations were opened for the Refugee Convention of 1951 to address climate refugees, various countries may try to weaken existing protections for other refugees.⁹⁰ This concern is a result of administrations with anti-immigrant sentiments, including the “Trump administration, which has barred people from eight countries—including refugees from war-torn Syria and Yemen—from coming into the country altogether.”⁹¹ As will be discussed in Section III, while current political attitudes make the advancement of climate refugee protections precarious, progress may be possible in the future. Changing customary attitudes towards climate change and refugee migration on local levels can pressure elected officials to take a more enlightened view on those issues and, subsequently, when to deploy troops in response.

However, the refugee classification conversation has the potential to not only be politically precarious, but also can be technically complicated. The blurred line between traditional refugees and climate refugees makes it hard for the international community to clearly define just how strong the causation between climate disasters and the displacement must be. For example, Puerto Ricans displaced by Hurricane Maria were refugees directly affected by a specific disaster, and therefore were easier to classify.⁹² However, other migrants are displaced because of slow-onset changes, like sea-level rise and desertification, which can make it harder to identify them as climate refugees.⁹³ As exemplified by the Syrian crisis discussed above, researchers are still working to understand how climate change interacts with other factors, such as national security and local economic trends, that cause instability and displace residents.⁹⁴

The challenges in implementing an international climate refugee classification speak to the fundamental difference between the international community and the current U.S. administration’s framing of the refugee movement. President Trump has touted that the migrant caravans are security risks. On the other hand, international policy frames refugee movement as a humanitarian issue. One possible solution to the climate refugee crisis is the international community continuing to frame refugee

90. Sengupta, *supra* note 15.

91. *Id.*

92. McDonnell, *supra* note 6.

93. *Id.*

94. *Id.*

movement as a humanitarian issue to sway societal norms, which could pressure politicians to mobilize troops in the interest of humanitarian concerns.

III. Solving the Problem Through a Shift in Normative Values

Both domestic and international law frameworks give significant deference to decision-makers concerning when military deployment is appropriate to mitigate climate refugee movement. This means decisions may be rooted in political agendas and does not ensure that nations consider refugee welfare, or that they address the underlying cause of refugee migration. One solution to this problem is using military policy to influence an evolution of public opinion on both refugee and climate change issues. This would then give rise to political motivations that reflect the shifted and more enlightened normative values of the populace. Additionally, continued international conversations of the recognition of climate refugees can influence military policy.

A. The U.S. Military Can Influence Normative Values on Humanitarian Aid

One way to address mass climate refugee migration and military deployment is to use advancements in military policy towards humanitarian principles to influence a normative value shift in the American public. This could then lead to a shift in the political agendas that future administrations and presidents may consider when deciding under what circumstances to deploy troops to intercept incoming climate refugees. Looking to the military to lead the way in this conversation is viable because Congress and the president authorize the military to use significant discretion in setting internal policies regarding security threats, such as human-induced climate change, which is one of the underlying issues causing climate refugees.⁹⁵

The leeway that Congress and the President have given to the military on climate change concerns illustrates how the military could also advance humanitarian aid principles. With bipartisan support, Congress enacted a bill for the 2018 Department of Defense (“DoD”) funding that accepted climate change as a given.⁹⁶ The bill then pushed the DoD to take significant steps to improve the resilience of DoD bases against climate change risks.⁹⁷ The President signed the bill in August 2018, approving the

95. Dino Grandoni, *The Energy 202: How to Get Trump to Sign Climate Legislation? Put It in a Defense Bill*, WASH. POST (Aug. 14, 2018), <https://perma.cc/6MBN-7LCG>.

96. John Conger, *U.S. Congress Addresses Climate Change and Security in the Latest Defense Bill*, THE CTR. FOR CLIMATE AND SECURITY (Aug. 13, 2018), <https://perma.cc/QVD9-ZMEA>.

97. *Id.*

U.S. military to guard its infrastructure against rising sea levels and other changes expected from global warming.⁹⁸

While this advancement in policy does not directly address climate refugees, it does address the underlying issue of climate change. It also exemplifies how the military has the capacity to lead these types of conversations that the rest of the administration might be unwilling to discuss. As a result, the military could also move forward with more progressive policies on how to mitigate mass climate refugee migration in a way that embraces international humanitarian principles. Further, the popularity of the U.S. military among the American public allows military policies to impact the American public's and private industry's normative views. The military is one of the few institutions a comfortable majority of Americans respect.⁹⁹ In fact, military approval has not dipped below seventy percent in the past ten years.¹⁰⁰

In addition to leading normative views, the military can influence the public through technology advancements. The adoption of technologies originally developed for military use in the twentieth century, such as the Global Positioning System ("GPS"), the internet, and computers exemplifies such technological influence.¹⁰¹ These types of repeated and sustained interactions between public and private institutions can likewise lead to the exchange of ideas, best practices, and technologies.¹⁰²

Researchers at Wharton University of Pennsylvania recently tested this connection between the military and the public in regard to environmental policies.¹⁰³ They suspected that the difference would be among conservative survey participants, or people who generally do not tend to favor environmental protection, but who do tend to value the role of the military in society.¹⁰⁴ They found that people who self-identify as liberal were more likely indicate a desire to purchase renewable energy from their utility when they learned that the DoD was actively using renewable energy technology.¹⁰⁵ However, at the time that the initial findings were released, their sample size was not large enough to make a determination on conservative purchasing habits.¹⁰⁶ This early study still

98. Grandoni, *supra* note 95.

99. Alice H. Friend, *5 Reasons to Be Concerned About Deploying U.S. Troops Along the Southern Border*, WASH. POST (Nov. 5, 2018), <https://perma.cc/F6T3-8ALQ>.

100. *Id.*

101. Sarah E. Light, *The Military-Environmental Complex and the Courts*, 32 J. LAND USE & ENVTL. L. 455, 456 (2017), <https://perma.cc/54CE-B3AU>.

102. *Id.*

103. *The Surprising Role the Military Plays in Environmental Protection*, WHARTON U. OF PA.: KNOWLEDGE@WHARTON (July 29, 2014), <https://perma.cc/4TKS-GMWD> [hereinafter *The Surprising Role*].

104. *Id.*

105. *Id.*

106. *Id.*

demonstrates that the military can influence more progressive policies and normative customs, or at least solidify certain customs among those citizens who are predisposed to the policies.

Here, the goal is to ultimately frame response to climate refugees as a humanitarian crisis as opposed to a security crisis, in order to encourage the president to reduce the amount the military is leaned upon to respond to these types of missions. Framing climate refugees in this way also ensures that the president deploys troops in a manner that is consistent with humanitarian principles. This is possible if the military continues to publish policies that embrace the international community's humanitarian approach to refugees. Therefore, international law can also help mitigate the response to mass climate refugee migration by continuing to move the humanitarian-focused conversation forward.

B. International Law Can Help to Mitigate the Current Crisis by Moving the Conversation Forward

Since the military takes international humanitarian principles into consideration when setting its humanitarian aid policies, it is critical that the international community move forward with discussing climate refugee measures. As previously discussed, there is some resistance and some risks in opening the topic of refugees up for discussion in today's political climate. Nevertheless, the international community should have these discussions about climate refugees, because it could influence domestic policies and shift normative values.

Some of the international frameworks that influence military policy today do not reflect the modern geopolitical climate, such as the Refugee Convention of 1951 treaty.¹⁰⁷ The framework for refugees stems from a different political climate than that of today. The international community must update the convention to reflect our modern understanding of the world. For instance, the international framework should include climate refugees by changing the definition of a refugee.¹⁰⁸ Article 1A of the Refugee Convention could be changed in a way that climate refugees fall under the scope of the article.¹⁰⁹

Another way to integrate climate refugees into the international framework is to codify the right to a safe and stable environment in the European Convention of Human Rights (ECHR).¹¹⁰ While the ECHR is not binding on the United States, it could help drive customary norms globally while also providing a less risky legal discussion in a smaller group

107. Sengupta, *supra* note 15.

108. Rick de Wit, *Climate Refugees*, MEDIUM (Dec. 15, 2016), <https://perma.cc/AGL5-NQAF>.

109. *Id.*

110. *Id.*

of states. Updating the legal language on treaties that encase a smaller amount of countries is the most viable solution as it carries less risk of multiple players tearing down existing refugee protections while also influencing normative behavior.

It is also worth mentioning another solution that has already been tested in the international community: creating a completely new Refugee Convention that would give climate refugees the rights to asylum.¹¹¹ A group of academics and advocates have spent the last two years trying this option by proposing an entirely new treaty, with new categories to cover those who are forcibly displaced, including because of the devastations of climate change.¹¹² One of the academics leading the effort to draft a new treaty, Michael W. Doyle, a Columbia professor, noted that he did not expect a new treaty to be embraced anytime soon, but insisted that “those conversations should start as record numbers of people leave their home countries and end up displaced in others, often without legal status.”¹¹³

Regardless of the solution chosen, the international community needs to continue working towards a conceptualizing of “climate refugees” because it stands as a challenge to many of the legal conventions that are currently taken for granted.¹¹⁴ There is power behind labels like “climate refugee,” and people affected by climate change should not have their human rights overlooked.¹¹⁵ There is power in this label especially because these principles can later be adopted by the U.S. military and ensure a humane response to mass climate change migration.

While integrating climate refugee language into the international framework requires a lengthy formal process, a short-term solution is for the U.N. Security Council to declare climate change a threat.¹¹⁶ This solution would address and validate the underlying climate refugee issue.¹¹⁷ If the U.N. Security Council determines that climate change is a threat to international peace and security, member states may be called upon to act.¹¹⁸ Additionally, the president can look to the U.N. Security Resolution as additional support for acting without congressional authorization, which is in line with past precedent.¹¹⁹ This could help the U.N. gain more influence to ensuring military interventions of climate refugees take the form of humanitarian aid, as opposed to the refugees themselves being viewed as security threats. For example, climate change poses a

111. *Id.*

112. Sengupta, *supra* note 15.

113. *Id.*

114. Su, *supra* note 79, at 28–29.

115. *Id.*

116. Nevitt, *supra* note 85, at 495.

117. *Id.*

118. *Id.*

119. *Id.*

devastating threat to Small Island Developing States (“SIDS”), such as Tuvalu or the Seychelles.¹²⁰ These small island nations’ territorial integrity and sovereignty are at risk due to sea level rise caused and exacerbated by climate change, making the SIDS more vulnerable to drought, famine, mass migration, and resource and food shortages.¹²¹ Waiting for a formal, legally binding international climate change or climate refugee agreement may not be an option for the survival of some SIDS.¹²² Instead, the U.N. Security Council can declare climate change a threat to international peace and security, calling on member nations take in refugees or provide humanitarian assistance.¹²³

There is some risk to addressing the climate refugee crisis through the U.N. Security Council, because expanding the definition of “threat” too broadly could result in member states openly criticizing the U.N. Security Council’s international legitimacy.¹²⁴ Member states could see a pronouncement of climate change as a threat to go beyond the U.N.’s original mandate. Ultimately, U.N. member states must be willing to accept the Security Council’s new role to overcome fears of illegitimate action.¹²⁵ Therefore, while the U.N. Security Council could provide short-term emergency solutions to managing military response to climate refugees, a more legitimate long-term and widely recognized solution would come from incorporating climate refugee language into international treaties.

Conclusion

The effects of climate change have threatened political stability through food and water shortages, pandemic disease, disputes over refugees and resources, and more severe natural disasters, all of which place additional burdens on economies, societies, and institutions around the world.¹²⁶ These burdens intensify as a growing number of people displaced by climate disasters look for new places to settle. Yet, the U.S. Constitution clearly defines the domestic chain of command for deploying troops to mitigate incoming climate refugees. How and why those vested with the power to command U.S. military make deployment decisions is largely unrestricted. On the other hand, even though the international community does acknowledge climate change and the dire situation of climate

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 495–96.

124. *Id.* at 496.

125. *Id.*

126. Daniel Y. Chiu, *Climate Change: The Impact on the United States Military*, 4 HAMPTON ROADS INT’L SEC. Q., 18, 20–21 (2014).

refugees, the lack of climate refugee-specific law leaves little structure to mitigate the current crisis. Therefore, it is important to review the laws that currently govern the use of U.S. military force towards climate refugees to build a more humane system in the future.

Thus, my proposed solution focuses on encouraging normative values to influence how troops mobilize to mitigate climate refugees attempting to reach the U.S. border. The international community can legitimize and normalize legal protections to climate refugees and encourage a more humane response from the U.S. military through their internal policies when the president orders mobilization. Internal U.S. military policy can then influence the U.S. electorate and create a more enlightened viewpoint on both refugees and climate change. By using more enlightened normative values to influence how politicians work inside the domestic law framework, it is possible to provide a more humane use of force model to mitigate mass climate refugees migration.