

POLITICO-LEGAL DIMENSIONS TO ENVIRONMENTAL REFUGEES

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Abstract: *Environmental refugees are a growing crisis, not recognised in international law. They face several political and legal challenges which need to be tackled.*

Introduction

Interest in the link between environmental change and human migration has grown in the recent years, principally due to the mounting body of evidence on the likely impacts of anthropogenic climate change. This growing concern has led to widespread discussion of the potential for climate change to induce population movement. The political nature of debates pertaining to issues of environment and migration has led to a highly politicised discussion regarding the potential existence of 'environmental refugees', a term which depicts environmentally displaced persons. While attention to this debate has grown rapidly in recent years, it is worth noting that the term 'environmental refugee' has been in use since the 1970s, well before the climate change debate was established (Morrissey 2009). First coined in the 1970s by Lester Brown of the World Watch Institute, 'environmental refugees' became popularised in the 1990s by Essam-El-Hinnawi. The term 'environmental refugee' is increasingly used despite having no agreed definition in international law, never having been formally endorsed by the United Nations and the failure of experts to reach any kind of consensus (Zetter et al 2007). Albeit there is an intense debate among scholars about the role played by environmental change in population displacement but there is a general agreement that environmental change is an important factor which forces people to move. Here the author will examine the political and legal dimensions to environmental refugees with a focus on State responsibility with regards to Climate Change and environmental displacement.

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1. Political Dimensions to Environmental refugees

One of the central themes of early accounts on environmental refugees in the 1980s and early 1990s is an emphasis on population levels and carrying capacity. Underpinning these views is the assumption that over-population combined with poverty leads to food insecurity. These conditions then produce the world's environmentally displaced people because ecosystems are unable to support the population needs. The emphasis on population and poverty is clearly seen in a forerunner to contemporary accounts of environmental refugees (Bristow 2007). Although such Malthusian-inspired thinking is apparent in some of the key early writings on environmental refugees, the emphasis on high population has become less central to explanations of environmental displacement in the late 1990s and 2000s. Literature in this period has largely moved away from focusing on how the highly populated south exceeds its own local carrying capacity, towards the implications of a more general deterioration of the global environment for human settlements. In this way, authors highlight how the effects of a multitude of environmental changes such as desertification, drought, floods, nuclear and industrial accidents and even development projects such as dam building can produce displacement (Jean Lambert 2002). The problem of environmental displacement is currently presented less as a function of overpopulation in poor regions of the world and more as the result of the activities of affluent countries. This is a significant shift because it suggests the activities of the developed countries, notably the process of industrialisation and high consumption patterns, are pinpointed as having considerable impacts particularly on poor people and the ecologically vulnerable areas of the world in which many of them live. In particular, the current literature points to how the acceleration of human induced (anthropogenic) climate change will be the most significant driver of displacement because its effects will impact upon people's abilities to secure a livelihood. Environmental displacement, in other words, is seen as a likely result of rising seas and expanding deserts spurred by interrupted hydrological cycles rather than the poor's own increase in population levels.(ibid, Lambert, 2002).

Within the intellectual and policymaking communities, there remains ongoing debate and scepticism as to the direct link between environmental climate change and displacement. While the causal relationship between, for example, economic indicators and migration is well-established both practically and intellectually (Douglas, et al 1993), the relationship between the environment and displacement has yet to be fully understood. However, as the effects of climate

change become more clearly demonstrable, the evidence is shifting in support of so called “climate refugees” and the international legal community have taken notice.

The current environmental displacement debate is at an impasse, and one of the first steps to break the impasse and advance the discussion is to decouple for analytical purposes climate change displacement from environmental migration. The question of causation that traditionally has undermined the category of environmental refugee, that is, the inability to identify empirically a particular environmental event as the principal factor in human migration—may no longer unduly limit the utility of the climatic displacement construct. There is now mounting evidence suggesting climate change to be a long-term cumulative phenomenon leading to human displacement. The precipitating causes for climatic migration may not bring about immediate population displacement, but their effects can accrue over time leading to long-term environmental damage and human migration (Kolmannskog 2008).

2. Legal Dimensions to Environmental Refugees

Environmental change or factors are openly challenging many of the long-standing conceptual, legal and organisational means of displacement. The existing refugee norms and structure are not adequately equipped to protect environmentally displaced persons. The international legal framework for refugees and internally displaced persons fail to provide protection to the people displaced due to environmental changes. The environmentally displaced persons do not fulfil the criterion of well-founded fear of persecution under the refugee convention 1951 as it does not match the criteria for specific reasons listed in the definition such as race, religion, membership of a particular social group or political opinion. Regional instruments like OAU (Organisation of African Union) Convention on refugees, 1969 and Cartagena Declaration on refugees, 1984 are also ill equipped to deal with the problem of environmental displacement (Cohen & Bradley 2010).

2.1 State Responsibility and Climate Change:

State Responsibility is a fundamental principle of international law, arising out of the nature of the international legal system and the doctrines of State sovereignty and equality of States. According to the principle of State Responsibility whenever a State breaches any obligation under international law or commits an internationally wrongful act against another State which

causes damage, a new legal relationship arises between the party committing the wrongful act and the party injured thereby. A breach of an international obligation gives rise to a requirement for reparation (Shaw 2003). International Law Commission (ILC) has been working extensively on State responsibility by adopting Draft Articles on State Responsibility (DASR) in 2001.

Responsibility in environmental cases will normally arise because of the breach of a treaty or a customary obligation. Treaty law is the main source of obligations in international environmental law, containing many more defined rules and differentiated obligations for implementation than customary law. The UNFCCC (United Nations Framework Convention on Climate Change), 1992 and the Kyoto Protocol, 1997 are relevant in the context of Climate change damages. The central question is whether they contain duties of State conduct that can be breached, i.e. an obligation on States to avoid damages. Naturally, for a State to breach an international obligation, the treaty containing this obligation must be in force in the State at the time of the breach. Therefore, large emitters of greenhouse gases (GHGs) which have not ratified the Kyoto Protocol, such as the USA, or do not have any reduction obligations, such as China or India, cannot be held responsible for noncompliance with the reduction targets under the Protocol. The question, thus, arises whether the UNFCCC contains direct obligations regarding climate change damages that would give rise to a claim for reparation under the law of State responsibility (Vicuna 1998). The UNFCCC, for example, does not contain provisions that define Climate Change damages or deal with the question of how such damages, if they occur, should be compensated. The history of negotiations shows that Parties decided to focus on mitigation provisions rather than on tackling potential damages to people, economies and ecosystems. Still, Parties were aware of the problem of damages. This awareness is reflected in the Preamble of the UNFCCC, which reiterates that States "have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". (See preamble UNFCCC, Para. 8)

Climate change damages are the result of a multitude of emitters, emitting activities and emitted gases. It is, thus, evident that the question of how to divide responsibility needs to be addressed. Could an injured State invoke the responsibility of another State when, in fact, more than one State has contributed to the wrongful act? Article 47 DASR stipulates that where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The challenge arising here is that Article 47 only applies to cases

where several States are responsible for the 'same wrongful act' and not to instances where several States independently commit acts that contribute to an indivisible harm, as in the instance of climate change damage (Voigt 2008). In the case of climate change damages, the Claimant State will also have emitted GHGs to some extent and thereby will be partly responsible for the ensuing damage. This issue is regulated in Article 39 DASR which states that where the Claimant State has, through wilful or negligent behaviour or omission, contributed to the injury, the extent of the reparation must be adjusted accordingly. Contribution to the damage will, therefore, not lead to an exculpation of the wrongful act, but may limit accordingly the legal consequences flowing from it. A State claiming compensation for damages on its territory resulting from changing climatic conditions will meet substantial challenges. While it is generally possible to invoke State responsibility for climate change damages, a number of conceptual uncertainties exist and many crucial details still remain unsettled which render the outcome of such a case highly unpredictable. The role of State responsibility has not played a large practical role in the environmental responsibility context. Most transboundary environmental concerns are solved through diplomatic means, negotiation and adoption of agreements. Case law is, thus, sparse and provides little guidance on complex environmental claims like that of climate change damage. The multiplicity of polluters and victims might pose insurmountable evidentiary difficulties. There is no clear international law rule on how to apportion damage between multiple wrongdoers or causes of climate change (ibid Voigt, 2008).

2.2 State responsibility and Environmental Displacement

During and after an environmental flight situation the State of origin continues to be obliged to respect, to protect and to fulfil human rights (exceptions exist in cases of public emergency). Regarding internal environmental flight, the UN Guiding Principles on Internal Displacement, 1998 is applicable. While it is contested these principles are legally non-binding, it is undisputed that they at least partly reflect existing international obligations; their added value consists inter alia in showing how human rights provisions oblige the State of origin to take mitigating measures during internal environmental flight. They are therefore a valuable tool in developing national policies and laws. However, the inability or unwillingness of most States that are affected by internal displacement to fulfil their responsibilities towards Internally Displaced Persons remains a problem (FEA, Germany 2010).

In the course of developing a burden/responsibility-sharing mechanism, the question needs to be answered whether (and to what extent) a differentiation between environmental and climate change displacement should be made. In general, all environmental displacement – no matter whether the environmental change is climate-induced or not, equally deserves protection. Thus, in view of the goal to achieve the best-possible protection for individuals, a differentiation does not seem desirable. However, third States are not likely to be willing to accept obligations of the same scope with regard to natural environmental change as with regard to, for example, climate change-induced incidents (in the latter case, the principle of common but shared responsibility is widely accepted and could therefore build the basis for a burden/responsibility-sharing mechanism). In cases of natural (not man-made) environmental flight situations, obligations could be established only for the State of origin. Within the group of man-made environmental flight situations, climate change-related flight situations constitute the majority of cases. In these cases, obligations could be established for the international community or in cases in which third countries which are most responsible can be identified for specific third countries. Depending on which case group the occurrence of an environmental change belongs to, different legal consequences might be triggered (ibid FEA, Germany, p. 13). The question of dividing responsibility in relation to Climate Change damages remains unaddressed and is a complex legal challenge to the international law to deal with. So this question needs to find a solution to effectively divide responsibility in case of Climate-induced displacements.

Conclusion

Environmental displacement is a pressing problem facing political and legal challenges. There is lack of comprehensive international protection of environmental refugees. Several scholars advocate the expansion of the refugee convention, 1951 to include the people displaced due to environmental reasons. While State responsibility on climate change damages remains a complex legal question, it is imperative to solve this legal query in order to divide responsibility and compensate in case of climate-induced displacement.

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