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POLICY ARENA

CLIMATE CHANGE, ENVIRONMENTAL DISPLACEMENT AND INTERNATIONAL LAW

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Abstract: This paper addresses the rights of environmentally displaced persons. The motivation is the compelling humanitarian imperative to ensure that those displaced have a minimum of rights, and the focus is on interpretations of existing law that the author considers in line with de Sousa Santos' subaltern cosmopolitanism. The paper draws on both scholarly debates and policy and practitioner discourses. To protect and strengthen the rights of environmentally displaced persons, we should fully exploit existing law by applying a dynamic and context-oriented interpretation of internally displaced person law, refugee law and human rights law. It would be useful to develop a soft law instrument that could provide authoritative guidance in this respect, drawing on the possibilities as well as remedying the limitations of existing law. Copyright © 2012 John Wiley & Sons, Ltd.

Keywords: climate change; environment; displacement; migration; international law; soft law; rights; cosmopolitan legality

1 INTRODUCTION

Global average temperatures are rising, and the weather is becoming wilder. The Intergovernmental Panel on Climate Change special report on managing the risks of extreme events and disasters describes how a changing climate is influencing certain disasters such as storms, floods and droughts (IPCC, 2011). It further states that there is 'medium agreement' and 'medium evidence' for the statement 'disasters associated with climate extremes influence population mobility and relocation, affecting host and origin communities' (IPCC, 2011, p. 8). According to a study by the Internal Displacement Monitoring Centre, 14.9 million people were displaced by sudden-onset natural disasters in 2011; the majority by climate-related disasters such as storms and floods (IDMC, 2012). In addition, hundreds of

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thousands fled slow-onset disasters such as the drought that developed into a famine on the Horn of Africa.

Although the line between voluntary migration and forced displacement is blurred and difficult to uphold, this paper focuses on environmental displacement and suggests how to distinguish between the two forms of movement. Separating out climate change can be justified to establish it as an important cause of disasters and displacement, the wider responsibility for displacement and the need for mitigation and adaptation funding. Thus, paragraph 14(f) of the Cancun Agreements is important in calling for cooperation as well as ensuring funding within a climate change context (UNFCCC, 2011; Kolmannskog and Trebbi, 2010). From the perspective of those affected, however, there is no compelling reason to distinguish between climate-related and other natural disasters (Kolmannskog and Myrstad, 2009; Kolmannskog, 2012; Kälin, 2010). In the following, the term environmentally displaced persons (EDPs) is used. This is meant as a descriptive term referring to those forcibly displaced at least partly because of a natural disaster – whether it is climate-related or not.

Seeking to strengthen the rights of EDPs can be seen as part of a cosmopolitan legality project. De Sousa Santos (2002) writes,

> 'More stridently even than others, environmental refugee flows portray the dark side of capitalist world development and global lifestyles. They should, therefore, become the best candidates for the application of a new and more solidary transnational conception of burden sharing.' (p. 226)

De Sousa Santos describes subaltern cosmopolitanism as 'a loose bundle of projects and struggles', 'counter-hegemonic globalization' which is an alternative to the hegemonic neoliberal globalization, and 'the struggle against social exclusion' (p. 459). Cosmopolitan legality is the corresponding legal approach, which 'furthers counter-hegemonic globalization' (p. 466). Eight theses sum up its conditions. The first of these are, '[i]t is one thing to use a hegemonic instrument in a given political struggle. It is another thing to use it in a hegemonic fashion.' In this paper, I investigate what possibilities and limitations lie in international law concerning EDP rights.

I argue that we – progressive policy makers, human rights lawyers and judges, humanitarian and development agency staff displaced persons and the public at large – should fully exploit existing international law by applying a dynamic and context-oriented interpretation of internally displaced person law, refugee law and human rights law as well as develop new law and policy on national, regional and international levels. With the much-discussed fragmentation of international law in mind, it is only to expect that we will need to look to many different instruments to strengthen the protection of EDPs. The following sections are structured according to what I see as relevant fields or approaches to international law relating to environmental displacement, such as international law on internal displacement, statelessness, refugees and human rights. I conclude by recommending that the creation of an overarching soft law instrument may draw on the possibilities and help remedy the limitations of these fields of law.

2 ILL-PROTECTED INTERNALLY DISPLACED PERSONS

The majority of EDPs remain within their country of origin (IASC, 2008; Wahlström, 2011). The 1998 Guiding Principles on Internal Displacement provides the framework for addressing all displacement occurring within a country. This soft law instrument is a synthesis of

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international refugee law, humanitarian law and human rights law as applied in the context of internal displacement. It contains a broad and descriptive definition of internally displaced persons (IDPs), which includes those fleeing man-made or natural disasters. United Nations (UN) agencies and the UN Special Rapporteur on the Human Rights of Internally Displaced Persons in particular, states, humanitarian agencies and other actors have clarified that this definition covers EDPs (IASC, 2008; Beyani, 2011; Wahlström, 2011).

Climate change re-actualizes the debate of whether IDPs are well enough protected and what would be the best way to enhance their protection. A 'hegemonic' understanding of state sovereignty allows for state abuses and lack of protection of IDPs in general. Alternative understandings of sovereignty as the responsibility to protect and ensure rights for all citizens are important in IDP advocacy and can be seen as part of subaltern cosmopolitanism.

Some call for, and have perhaps always called for, a convention, but there is no guarantee that this would better address the operational and implementation challenges. While conventions often have little impact in reality, the Guiding Principles are increasingly being incorporated into national laws and policies as well as applied by humanitarian and development agencies (Koser, 2008). There are several advantages to soft law, including the flexibility in negotiating with governments, and one can always invoke the hard law that lies behind it if necessary (Kälin, 2001). At the same time, the AU's 2009 Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa may signal a new direction, at least at the regional level.

Environmentally displaced persons also face particular challenges. First, the leadership role for international assistance and protection in natural disasters is decided on by UN agencies on a case-by-case basis, often resulting in lack of predictability and rapidity of response. The UN High Commissioner for Refugees has said that he is willing to take on a lead, but he lacks the necessary support among member states and donor governments (Guterres, 2009).

Second, the protection lens in natural disaster response is still poorly understood at the national level, particularly by state agencies, which after all bear the principal duty to protect (Albuja and Cavelier, 2009). Main findings from case studies include a lack of domestic, normative frameworks and policy implementation (Zetter, 2011). The Guiding Principles and more detailed operational guidance could provide a viable and practical way for developing normative frameworks (Zetter, 2011).

Third, there are particular challenges relating to evacuation, relocation and return (Kolmannskog, 2012). Although the Guiding Principles offer some guidance on participation and non-discrimination, there have been calls from both scholars and international agencies for more specific operational guidelines on for example community-based planned relocations in the context of climate change (Bronen, 2008; Türk, 2011). Furthermore, the framework for durable solutions has been drafted mainly with a view to conflict displacement. In some natural disasters, people simply cannot return because their home place has become permanently destroyed or too disaster prone (Kolmannskog, 2008; Koser, 2008).

An unclear legal area is that of movement in the context of slow-onset disasters like drought. Some people move pre-emptively before the disaster has become acute, but even those who move when the drought is severe are often seen as 'distress migrants' and do not receive the same level of attention and protection as people seen as 'displaced' due to conflict and sudden-onset disaster (Kolmannskog, 2010; Koser, 2008). One could argue that when the whole household has to leave its land – rather than merely send off a typically male member to work elsewhere – we can speak of displacement (Kolmannskog, 2010; Kälin and Schrepfer, 2012). Regardless of whether people initially moved

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voluntarily, they can also be considered displaced if the land later has become so degraded that they cannot return (Kälin, 2008b; Kolmannskog, 2012). This is similar to the return-ability test discussed, in cross-border cases, further in Section 5.

Increasingly, this issue is getting international attention. After effective negotiation efforts (UD, 2011), the General Assembly included climate change and environmental displacement in its 2011 resolution on IDPs (A/C.3/66/L.45/Rev.1) and encouraged the Special Rapporteur, in close collaboration with states, IGOs and NGOs, to continue to explore the human rights implications and dimensions to support states to build local resilience and capacity for prevention and protection.

In conclusion, many EDPs are IDPs, and the Guiding Principles apply to them, although more detailed operational guidance may be necessary. The main challenges are lack of state ability and will to ensure their rights. The question of ability is related *inter alia* to international support and assistance. When it comes to the (lacking) will, we must be prepared for 'political mobilization of international human rights or [. . .] humanitarian intervention in situation of extreme, life-threatening forms of social exclusion (de Sousa Santos, 2002, p. 488)'. The lack of state ability and will also means that humanitarian and development agencies are crucial; they must also understand and apply law and policy in line with cosmopolitan legality and not for example exclude EDPs from their understanding of IDPs (Kolmannskog, 2008, 2010; Kälin and Schrepfer, 2012).

3 SINKING ISLAND STATES

Many island states will probably be uninhabitable because of natural disasters and other climate change effects long before a sea level rise possibly swallows them. Many people are likely to move before the territory of the state has disappeared. Such displacement has similarities with other cross-border displacement discussed in the following. Here, I will only briefly discuss the particularities of statelessness.

Debatable questions include whether it is necessary for all of the territory to disappear completely before the state ceases to exist and whether the state would cease to exist even then. International law favours stability and the continued recognition of states regardless of crises (Crawford, 2006 referred to in Kälin and Schrepfer, 2012, p. 38). Even if the state did cease to exist, its citizens would not necessarily become stateless. According to the 1954 Convention Relating to the Status of Stateless Persons article 1, a stateless person is 'a person who is not considered as a national by any state under the operation of its law'. According to McAdam and Saul (2010), the islanders would not be considered stateless because the definition of statelessness is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether.

Importantly, it is doubtful if the islanders have anything to gain from being considered stateless. It almost goes without saying that in today's world, it is of high importance for an individual to be considered a citizen of a state. Even without much territory, the island states could at least advocate for its citizens in UN and other fora. Furthermore, current statelessness instruments are hardly sufficient to address the specific needs of islanders, including relocation.

In at least one respect, raising the islanders' challenges as a statelessness topic makes sense. In addition to the aforementioned convention, there is also the 1961 Convention on the Reduction of Statelessness, and UNHCR has a mandate to prevent and reduce statelessness as well as protect stateless persons (GA/RES/50/151, 9 February 1996, paras. 14–15). Resorting to

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the statelessness discourse has therefore meant that UNHCR is able to initiate and justify engagement for the small island states. UNHCR recommends multilateral comprehensive agreements ensuring admittance, status and rights, including cultural rights (UNHCR, 2009b).

The island states themselves differ in their approach to this matter. Whereas some advocate for relocation to feature in international agreements, others have been opposed to this (McAdam and Loughry, 2009; Ramesh, 2008). Tuvalu fears that industrialised countries may simply think that they can solve problems like rising sea levels by relocating affected populations rather than reducing greenhouse gas emissions. Kiribati not only tries to secure enhanced labour migration options but also recognises the need for international humanitarian agreements.

We must go beyond existing law to substantially address the plight of island states. However, international law and human rights principles such as participation and international cooperation can guide our efforts to do so. First, many islanders do not want to leave their homes, and so increasing climate change mitigation and adaptation to remain *in situ* is very important. Second, many Pacific islands have long-standing migration links to countries such as Australia and New Zealand, which could be helpfully built upon. Third, regional rights-based instruments must be developed as recommended by UNHCR to ensure admission, status and rights, including cultural rights.

4 REFUGEE REINTERPRETED

The 1951 Convention relating to the Status of Refugees was created mainly by European males for the specific problems of European males after the Second World War; it is a product of its time and creators (Kolmannskog, 2008). According to article 1 A of the 1951 Convention as modified by the 1967 Protocol (which deleted the geographic and temporal limitations), a refugee is a person who

> 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country [. . .]'

After assessing the different grounds and criteria, several scholars conclude that EDPs are not refugees (Falstrom, 2002). It is important to appreciate that the concept is socially and historically constructed and not "natural" or inherently and morally given. At the same time it is strategically important to see what is politically feasible today. Amending the 1951 Convention seems like a straightforward way of securing cross-border EDP rights. Government officials from the Maldives and Bangladesh have advocated this solution (McAdam, 2011b). Critics have highlighted that this would risk a full renegotiation of the Convention, which, in the current political situation, could undermine the international refugee protection regime altogether (UNHCR, 2009a). There is an increasing consensus among refugee experts and agencies that the 1951 Convention must be left as it is.

The author of this paper has argued for dynamic and contextual interpretations of existing refugee law (Kolmannskog, 2008; Kolmannskog and Myrstad, 2009; Kolmannskog and Trebbi, 2010). This is an example of how we can 'use a hegemonic instrument in a given political struggle.' The 60-year-old Convention has shown flexibility and remained relevant. For example, gender-related persecution was not considered by its drafters either, but feminist jurisprudence has been successful in arguing for a gender-sensitive interpretation of the

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Convention. Similarly, it may be too quick to say that EDPs are never covered by the refugee definition.

First, human mobility is multicausal. As illustrated by many Somali refugees, people may flee in the context of natural disasters, whereas the well-founded fear of persecution exists independently (Kolmannskog, 2008, 2009, 2010; UNHCR *et al*., 2009).

Second, there are cases of politicized disaster relief. For example, New Zealand granted refugee status to a woman activist from Myanmar after cyclone Nargis because she had a well-founded fear of being arrested for, *inter alia*, having distributed humanitarian aid financed by foreign supporters of an opposition party (Refugee Appeal No 76374, Decision of 28 October 2009, cited in Kälin and Schrepfer, 2012, p. 32).

Third, experience shows that natural disasters are prone to human rights violations (IASC, 2006), and serious or systematic human rights violations are normally considered to amount to persecution (UNHCR, 1992, para. 53). Certain marginalised groups of people such as ethnic minorities and political dissidents are often more vulnerable and exposed to disasters in the first place and receive less protection and assistance during and after a disaster. In a similar manner to gender cases, the nexus requirement of the Convention could be fulfilled when lack of protection from the state is linked to one of the five grounds (race, religion, nationality, membership of a particular social group or political opinion). Persecution and lack of protection are related concepts. In line with the tendency towards more positive human rights obligations, a certain lack of protection in extreme circumstances could in itself be considered persecution. As a minimum, the 1951 Convention is applicable in situations where people flee because their government has consciously withheld or obstructed assistance to punish or marginalise them on one of the five grounds (UNHCR, 2009a; Wahlström, 2011).

Fourth, there may also be cases of 'environmental persecution' such as when a government induces famine by reducing the water flow, poisoning water or destroying crops; Saddam Hussein's attempt to destroy the Marsh Arabs is an often-cited example (Cooper, 1998; Lopez, 2009; McAdam, 2011a; Kälin and Schrepfer, 2012). When governments intentionally increase vulnerabilities and contribute to environmental destruction and disasters, this could be seen as persecution.

Regional treaties may also offer some protection (Williams, 2008; McAdam, 2011a; Kolmannskog and Trebbi, 2010; Kälin and Schrepfer, 2012). Arguably, regional approaches that can accommodate political, social and cultural differences as well as the regional differences of climate change impacts can be more in line with cosmopolitan legality that 'furthers counter-hegemonic globalization' than global, one-size-fits-all solutions. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees include as refugees persons forced to flee because of events or circumstances seriously disturbing public order. This has not been understood to cover natural disasters, but jurisprudence is scarce, and there is a need to develop doctrine and guidance to states on the interpretation of these criteria (Kolmannskog, 2009). Although the 1994 Arab Convention on Regulating Status of Refugees in Arab Countries has not gained much practical relevance, it does in fact already cover natural disasters if they lead to a serious disruption of public order (Kälin and Schrepfer, 2012, p. 33). For Europe's part, Kolmannskog and Myrstad (2009) have argued that environmental displacement is partly addressed through the Common European Asylum System.

A fundamental challenge in the field of refugee law is the generally bad political climate for refugees today. There is no global refugee court, and even if there are increasingly effective regional mechanisms, countries retain much discretion to interpret refugee law.

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However, the indeterminacy of law means that not only authorities can manipulate the interpretation of law and its outcomes but also we can insist on a different, cosmopolitan interpretation and result. De Sousa Santos writes,

> 'It is possible to use the hegemonic tools of state law and individual rights in a non-hegemonic way [. . .] Manipulability, contingency and instability from below is the most efficient way of confronting manipulability, contingency and instability from above.' (p. 467)

Dynamic and contextual interpretation of existing law is crucial to protect and strengthen EDP rights. In cases where the link to the 1951 Convention criteria is less obvious, or even completely lacking, the need for protection may still be unmet (IASC, 2008; Wahlström, 2011; Kälin and Schrepfer, 2012).

5 STILL HUMAN

Some solution to the protection gap is found in broader human rights law and considerations of returnability (Kälin, 2008a; Kolmannskog, 2008; Kolmannskog, 2009; Kälin and Schrepfer, 2012; Wahlström, 2011).

In the European Court of Human Rights, there have been a series of cases where socio-economic and humanitarian conditions have been considered in an assessment of inhuman treatment and Article 3 of the European Convention on Human Rights and Fundamental Freedoms. In *D. v. the UK* (application no. 30240/96, 2 May 1997) and *N. v. the UK* (application no. 26565/05, 27 May 2008), the court considered that returning an HIV-infected person to respectively St. Kitts and Uganda would amount to inhuman treatment due to the person's vulnerability and conditions in the countries. In *N. v. the UK*, the court held that humanitarian conditions would give rise to a breach of Article 3 in very exceptional cases where the humanitarian grounds against removal were 'compelling'. One could consider that persons with particular vulnerabilities are protected against return to humanitarian disaster situations where there is lack of clean water, food, work and so on.

In *Sufi and Elmi v. the UK* (application nos 8319/07 and 11449/07, 28 June 2011), the court discussed the forced return of Sufi and Elmi to Somalia and what would be the appropriate returnability test. When there is a 'pure' natural disaster situation in a country, we can now safely apply the *N. v. the UK* test. If there are several factors, including for example a natural disaster and generalised violence, we can resort to the more lenient test of *M.S.S. v. Greece and Belgium* (application no. 30696/09, 21 January 2011), where the court had regard to the ability to cater for most basic needs such as food, hygiene and shelter, vulnerability to ill-treatment and the prospect of an improved situation.

We find similar practice on the 1966 International Covenant of Civil and Political Rights and the 1984 Convention Against Torture, but the corresponding human rights bodies have not gone as far as the European court (Kolmannskog, 2008; Kolmannskog, 2009). Hopefully, other regional and international bodies will follow the lead of the European court on the understanding of inhuman treatment while retaining room for political, cultural and social differences in their human rights understanding.

The *Sufi and Elmi* case illustrates that a human rights approach is relevant both in sudden-onset disasters and slow-onset disasters. This approach, which focuses on return, offers some solution to the challenge of determining what is displacement in slow-onset disasters. The focus is not so much why someone left initially but rather whether the gradual deterioration has reached a critical point where they cannot be expected to return

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now (Kolmannskog, 2009; Kolmannskog and Trebbi, 2010; Kälin and Schrepfer, 2012). This means, however, that migrants moving pre-emptively would not be protected against return. Another obvious limitation is that the affected person would first need to reach a safe country in order not to be returned; this is made increasingly difficult through visa regulations and interceptions (Kolmannskog and Trebbi, 2010).

Existing human rights law does not provide for a right to enter, stay nor dictate the content of any protection, but it can provide a basis for complementary protection status. In human rights-based complementary protection provisions, natural disasters may not figure explicitly. Finland, on the other hand, explicitly mentions 'environmental disaster' and grants temporary protection or permanent protection status for persons who cannot return safely to their home country because of such disasters (Kolmannskog and Myrstad, 2009). Can and should we separate out the environment in policy and law or should we rather take that factor into account in a more general human rights-based assessment? There is consensus that climate change impacts depend on human vulnerability. The natural environment often interacts with socio-economic and political factors. This complexity may be better accommodated in a human rights-based approach rather than in provisions separating out the environment as a cause for displacement. Continuing to build on human rights also means that we are not just creating a new narrow category for protection and excluding others in need. On the other hand, the discretion in interpreting human rights involves the risk that we are too much at the mercy of the few state officials who are tasked to interpret and apply it. This is particularly a challenge in the field of immigration law because of the volatile political situation and shifting feelings toward refugees and other immigrants. Another challenge relates to states not being willing to go any further than any other state in providing protection for displaced persons for fear of attracting more asylum seekers. There is therefore a need for a global, authoritative interpretation or guidance on how to develop and apply a human rights-based complementary protection regime in the context of environmental displacement. Establishing provisions that explicitly mention the environment, such as the Finnish, remains a second best option.

6 FINAL REMARKS

This paper has shown that there are both possibilities and limitations in existing international law concerning EDP rights. Several scholars and advocates have called for the creation of new treaties (Falstrom, 2002; Biermann and Boas, 2010; Docherty and Giannini, 2009; Hodgkinson *et al*., 2009). Such proposals have been much criticised, partly because we cannot expect any global, rights-based and effective instrument to be developed in today's political climate (Kolmannskog and Trebbi, 2010; Mcadam, 2011b). Creating laws can serve other functions than actually remedying suffering on the ground; for example, Aubert (1950) has shown that the symbolic function was predominant in price and competition legislation in Norway in the 1940s: The workers were happy they had a law and the middle and upper classes were happy that they had a law that did not work. As this paper has shown, major challenges for EDPs include the interpretation and implementation of existing law in today's political climate. New laws are not necessarily the answer to these challenges. The results of a ministerial meeting hosted by UNHCR in December 2011 show how contentious the issue of environmental displacement still is with states (UNHCR, 2011). We can find some reason for optimism, however. Switzerland and Norway made a joint pledge 'to cooperate with interested states and relevant actors,

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including UNHCR, to obtain a better understanding of cross-border movements provoked by new factors such as climate change, identify best practices and develop a consensus on how best to protect and assist those affected (UNHCR, 2011).' The process to follow up on this pledge, the Nansen Initiative, may eventually result in a soft law or policy framework.

A soft law instrument could draw on possibilities and seek to remedy limitations of existing international law. This approach has much support among scholars, policy makers and practitioners (Zetter, 2008; Kolmannskog, 2008; Betts, 2010; Martin, 2011; Kälin and Schrepfer, 2012; Foresight, 2011; Wahlström, 2011). Guiding principles could be used as authoritative guidance when applying IDP law, refugee law and human rights law to EDPs as well as for inspiration for the development of complementary protection status, regional mechanisms addressing the plight of the island states and other instruments. This paper has made some contributions to what such principles could include by promoting certain interpretations of existing law. Perhaps they should also address environmental migration. Facilitating migration can reduce humanitarian disasters and displacement (Foresight, 2011). Yet, as we have seen, preemptive environmental migration is not well catered for in international law today.

Until we see such guiding principles and their effective implementation, those of us who seek to protect and strengthen the rights of environmentally displaced persons must use law and other instruments strategically, including their scope for interpretation. We must also increase our advocacy and communication efforts and mobilise politically.

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