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The international legal protection of environmental refugees: a human rights-based, security and state responsibility approach

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9 | General conclusion on the legal international framework

This paragraph will provide a general conclusion on the most significant benefits and weaknesses of the different approaches. This forms the basis for Part III that discusses possibilities for the development of the various approaches and Part IV that discusses the possibilities for and integral approach.

9.1 CONCLUSION ON THE RIGHTS-BASED APPROACH

A rights-based approach has some clear advantages. Human rights provide a legitimate set of guiding principles for global public policy because they are widely accepted by societies and governments everywhere. Human rights can help strengthen government accountability and clarify the scope of authorities' responsibilities.¹ The human rights system focusses on the effect of the environmentally forced migration on people, therefore difficult questions such as whether the migration is forced (see the security approach) or the cause of the environmental degradation (see responsibility approach) can be omitted. The human rights system also provides a forum where individuals can hold their States to account. The added value of a rights-based approach therefore lies in the identification of environmentally forced migration as a human rights infringement.²

Every State, has a duty to adopt measures to protect everyone within its jurisdiction from the harmful effects of environmental degradation. The fact that the State did not cause the threat does not excuse the State's failure to try to protect against it. Moreover, a State unable to fulfil these duties with its own resources may be obliged to seek assistance from other States.³ As the majority of environmental refugees will remain internally displaced, most of the responsibilities under the human rights approach lie with the home State. The home State is therefore the main duty-bearer to protect their rights. This distribution of responsibilities is in stark contrast with the reality that the countries that have contributed the most to anthropogenic climate change (as a major cause of environmentally forced migration) will be the least affected

1 Kälén, Schrepfer 2013, p. 12.

2 UNGA UN Doc A/67/299 2012.

3 Knox 2009, p. 37.

by it. As Zetter has argued: ‘what has enforced displacement is a global process, not a local crisis.’⁴ Therefore, the obligation for States to support the development of human rights in other countries, needs to be further built upon. ‘The cooperation principle within human rights law underscores the need for resource and technology flows from wealthier to poorer nations to assist in mitigation and adaptation.’⁵

Human rights do not require States to respond to every threat to human rights, wherever it arises.⁶ Under human rights law States are required to strike a reasonable balance between environmental protection and other issues of societal importance, such as economic development. This balance may however not violate minimum substantive standards. However, as most of the rights affected by or violated by environmental degradation are second or third generation rights, these rights are generally not justiciable and are therefore subject to political supervision. Also, as environmental degradation, and climate change in particular, will place an additional burden on the resources available to States, economic and social rights are likely to suffer.⁷ Furthermore, ‘courts may lack the resources and expertise, as well as the political mandate, to determine specific levels of environmental protection.’⁸

As many types of environmentally forced migration are due to slow onset processes, there is a time frame to prevent forced migration all together. Human rights obligations generally do not cover future risks and therefore lack this possibility. Only through procedural human rights such as the right to information, the ‘affected persons can impact the decisions made on their future. If adaptation policies fail, the procedural rights may also be instrumental for access to a court. The effectiveness of procedural rights is however seriously harmed by the fact that States most likely to suffer severe human rights harms are poorly resourced States that often lack the means to compile quality data and to attract broad-based international support.’⁹

9.2 CONCLUSION ON THE SECURITY APPROACH

The security approach often treats environmentally forced migration as a reactive response of last resort where migration is seen as failure. This perception can steer the debate in the direction of how to avoid those environmental refugees to come to developed countries, leading to a stricter migration

4 Zetter 2008, P. 62 and 63.

5 Farkas, Kembabazi & Safdi 2013, p. 36.

6 Knox 2009, p. 3 and 4.

7 For an extensive analysis on the impact of climate change on economic, social and cultural rights see Jodoin, Lofts 2013, UNGA UN Doc A/HRC/22/43 2012, or Humphreys 2008, p. 25.

8 Knox 2009, p. 29.

9 Vliet van der 2014.

regime. Migration as a whole is generally left to national legal discretion rather than being subject to comprehensive international legal control. International law is particularly poorly equipped to respond to the challenge of climate-induced displacement.¹⁰ Environmental refugees generally do not qualify as refugees in the legal meaning. They are therefore perceived as regular migrants. Regular migration schemes however only cover a small group of people and do not reflect the forced character of the flight.

Humanitarian aid and temporary access schemes can be very beneficial in the context of sudden onset disasters. However, temporary access (with an unclear legal status) is not an option for long term migration due to slow-onset disasters or permanent (planned) resettlement. Also other forms of complementary protection show very little promise. In general, it is safe to conclude that international law is currently poorly equipped to respond to the challenge of climate-induced displacement and the potential security risks it may bring.

The security approach may however be beneficial in sparking interest from particularly developed States for the topic of environmentally forced migration. As internal migration is beginning to be acknowledged as a security challenge, both as a traditional security issue and as a human security issue, this may shift the focus from home State responsibility to one of international co-operation. This will be discussed in part IV.

9.3 CONCLUSION ON THE RESPONSIBILITY APPROACH

The basic rule of international environmental law is that States are duty-bound to prevent, reduce and control risk of environmental harm to other States. Therefore, the responsibility approach focusses the debate in two directions. The first is the prevention of environmental degradation and the second is the responsibility of polluting States to make full reparations for any injuries caused. Both these elements are relevant for environmental refugees. A prevention of environmental degradation may prevent the need for migration all together. If migration cannot be prevented, compensation for climate change damages may be sought.

The prospect to receive compensation for climate change damages on the basis of international environmental law is low. States are very reluctant to fall back on the international law of State responsibility to settle disputes on cross-border environmental degradation or damage to the global commons. States that are willing to claim compensation for damages on its territory resulting from changing climatic conditions will meet substantial challenges, 'international law is ill equipped when confronted with a complex situation, such as compensation for climate change damages. Vague primary rules,

10 Saul 2009, p. 11.

multiplicity of actors, different types of damages and non-linear causation all pose significant challenges to the traditional law on State responsibility.¹¹

Treaty obligations on climate change are sparse and often ambiguous and use broad terminology. 'While a specific obligation to prevent climate change damage could be read into Article 2 and 4.2 UNFCCC, there is still a wide margin for interpretation.'¹² With the adoption of the COP21 Paris Agreement, a legally binding global action plan to limit global warming to well below 2°C was accepted. Even though migration was explicitly mentioned, it remains to be seen if environmental refugees can benefit from the UNFCCC regime. At a minimum – as was reflected in the subsequent COPs – forced migration is now a topic that is considered as a mainstream element of climate change. The Task Force on Displacement has played an excellent role in clarifying the concept and putting it on the agenda. A next step would be the identification and adoption of enforceable rights for environmental refugees.

General principles of international environmental law have to be applied through an obligation of due diligence. This includes a balancing test, 'which renders the definition of an objective standard almost impossible. Thus, a heavy burden of proof is placed on the State which has to establish a failure to act with due diligence.'¹³ The Dutch Urgenda case has shown that a lower standard of causality can be adopted for cases that do not claim an award of damages, but that require an order that the State is acting unlawfully.

Even though it may be difficult to establish State responsibility and liability in a legally enforceable way, the general principles under this approach may be beneficial in the context of justice considerations. It is evident from current scientific research that the States most affected by climate change have hardly contributed to it. From a perspective of justice, the responsibility approach can therefore be beneficial in emphasizing the responsibility of the developed States to contribute to a solution. This will be further discussed in part IV.

11 Voigt 2008, p. 1, 2 and 20.

12 *Ibid.*, p. 20.

13 *Ibid.*, p. 21.