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

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12 The responsibility approach

The purpose of this chapter is to assess existing legal principles on their possibility to be elaborated, adapted, or particularised to respond to this new situation of environmental refugees, through creative interpretation or extrapolation by analogy. In contrast to part 2, this chapter will also consider the moral and ethical side of responsibility.

As international environmental law is very fragmented and is often developed after a particular incident, it is hard to predict how this field of law will respond to new threats, such as climate change. Another complicating factor is that States are very reluctant to settle their disputes in the legal context of State responsibility. Therefore, case law is as limited as it is fragmented. Consequently, it is difficult to predict developments in that area. Both legal regimes struggle with the complexity of the causes of climate change and the cumulative causes. 'In the absence of an agreed approach in international law on the determination of causation, it is not clear how a court or tribunal would deal with the issue of complex and cumulative causes.'[1] On the national level, courts are already confronted with these difficult issues[2] and might provide some input on the answer. Against this background, this chapter will explore alternative possibilities for responsibility outside the accountability framework.

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1 Voigt 2008, p. 16.

2 A German court has ruled in *LLiuya v. RWE* that it will hear a Peruvian farmer's case against energy giant RWE over climate change damage in the Andes, a decision labelled by campaigners as a 'historic breakthrough'. In this case, Lliuya argues that RWE, as one of the world's top emitters of climate-altering carbon dioxide, must share in the cost of protecting his hometown Huaraz from a swollen glacier lake at risk of overflowing from melting snow and ice. RWE's power plants emitted carbon dioxide that contributed to global warming, increasing local temperatures in the Andes and putting property at risk from flooding or landslides. Now the court must decide whether the accused's contribution to the chain of events depicted here is measurable and calculable. In 2018, in two separate cases, New York City and Massachusetts, and San Francisco and Oakland brought a case against ExxonMobil, Chevron, Shell, BP, and ConocoPhillips. The suit alleges that the defendants – five of the largest publicly traded carbon producers – are responsible for historical contributions to, and damage from, climate change, and that they 'engaged in a sophisticated climate denial effort which misled consumers, investors and the public and exacerbated the climate crisis by delaying meaningful action to reduce emissions.' In the Netherlands a case was filed against Shell by Milieudefensie in 2019. This case is a follow-up of the Urgenda case in which the government was addressed.

12.1 International Environmental law

The legal status of international environmental law principles and concepts is varied and may be subject to disagreement among States. 'Some scholars believe the development of a single comprehensive treaty of fundamental environmental norms may be a future solution to counteract fragmentation and provide clarity about the legal status of various principles.'[3] I consider this an unlikely development, in particular due to the disagreement on the legal status. Such a project would at best support the codification of the most modest explanation of environmental law principles. It would also have to be very general and would – especially in the context of complex issues such as climate change – require a lot of adaptation to specific situations. Even though it would clarify the legal status, it would still leave many questions unanswered.

> 'The focus of international environmental law today is preventative and precautionary, to manage environmental risk and protect the environment on a global level.'[4] Experience has taught us that 'prevention of environmental harm should be the "Golden Rule" for the environment,' for both ecological and economic reasons. Harm is often irremediable, or the 'costs of rehabilitation are often prohibitive.'[5] The concept of prevention 'gives rise to a multitude of legal mechanisms, including prior assessment of environmental harm, licensing or authorization that set out the conditions for operation and the consequences for violation of the conditions, as well as the adoption of strategies and policies [good governance].'[6]

12.2 Human rights

In order to be able to play a role of meaning, human rights laws and institutions must evolve fast to rise to the unprecedented international challenge that climate change creates.

> 'As human rights adjudication bodies hear future climate change-related claims, they may be able to assign State responsibility for mitigation and adaptation measures in a way that overcomes the challenge of future and diffuse causation in tort liability. A human rights approach emphasizes the obligation of all States to cooperate in mitigation and adaptation with maximum urgency and to the maximum extent possible to ensure the progressive realization of human rights as the climate change threat progresses'.[7]

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3 Kurukulasuriya, Robinson 2006, p. 24, para 9.
4 Esrin, Kennedy 2014, p. 62.
5 Farkas, Kembabazi & Safdi 2013, p. 32, para 57. See also Voigt 2008, p. 7-10.
6 *Ibid.*, p. 32, para 58. See also Voigt 2008, p. 7-10.
7 Farkas, Kembabazi & Safdi 2013, p. 37 and 38. see § 10.3.2.

Human rights bodies can also clarify the legal obligations of for example positive obligations in the context of climate change. Human rights bodies may provide access to justice for individuals that are affected by climate change. The 'International Council on Human Rights Policy' has suggested that:

> 'if some or all of the justice claims already acknowledged within the climate regime can be refined and successfully channelled through human rights – or if human rights law can provide a basis for choosing among them – both disciplines will be enriched and many individuals stand to benefit. At present, however, it appears that inchoate property rights (to environmental entitlements) are trumping inchoate human rights (to protection from and reparations for environment related damages).'[8]

Human rights bodies may provide access to justice. Individuals may be able to challenge the behaviour of their own State. They may base their claims on acts of pollution by their national State or on a failure of their national State to protect them against the consequences of pollution by non-State actors or third States. However, from a practical point of view (or based on considerations of justice) it would be most beneficial if the actions of the most polluting States could be challenged for human rights courts of the countries that are heavily affected, but have contributed little to the problem ('diagonal' human rights obligations).[9] The Advisory Opinion from the IACtHR as requested by Colombia on the environment and human rights ((Obligaciones Estatales en Relación con el Medio Ambiente en el Marco de la Protección y Garantía de los Derechos a la Vida y a la Integridad Personal – Interpretación y Alcance de los Artículos 4.1 y 5.1, en Relación con los Artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos)[10] 'opens a door – albeit in a cautious and pragmatic way – to cross-border human rights claims arising from transboundary environmental impacts.'[11] If the explanation of Feria-Tinta and Milnes is accepted that the 'effective control' requirement can be explained as 'effective control over the activities carried out that caused the harm and consequent violation of human rights,'[12] this means that third States may

8 Humphreys 2008, p. 55-60.

9 See § 7.3.

10 IACtHR, *Environment and human rights Obligaciones Estatales en Relación con el Medio Ambiente en el Marco de la Protección y Garantía de los Derechos a la Vida y a la Integridad Personal – Interpretación y Alcance de los Artículos 4.1 y 5.1, en Relación con los Artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos*, Advisory Opinion 2017.

11 Feria Tinta, Milnes February 26, 2018.

12 IACtHR, *Environment and human rights Obligaciones Estatales en Relación con el Medio Ambiente en el Marco de la Protección y Garantía de los Derechos a la Vida y a la Integridad Personal – Interpretación y Alcance de los Artículos 4.1 y 5.1, en Relación con los Artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos*, Advisory Opinion 2017, para 104. 'En virtud de todas las consideraciones anteriores, de conformidad con los párrafos 72 a 103 y en

be held to account in international human rights courts for not preventing pollution that is under their effective control and that led to human rights violations. However, it is not very likely that international human rights courts easily accept this explanation, as this would limit the sovereignty of States.

National jurisprudence indicates that problems of causation and attribution may be overcome.[13] However, several significant problems remain. As environmental degradation affects groups of people and the actions of the people in those groups affect the need for migration, this is not easily translated into human rights violations. Also the allocation of loss is a very complex task, that international human rights tribunals are most likely unable to perform. So far, there is no clear indication of how international human rights tribunals allocate this type of multi-causal, multi-party loss. It may be argued that these complex damages may be better dealt with under a system of CBDR as has been accepted in the climate change negotiations.

12.3 RESPONSIBILITY

As has been discussed in chapter 7, the possibilities for State responsibility are limited. However, Voigt argues that: 'the continuing relevance of the principles of state responsibility is not to be underestimated. [...] Given the urgent need to strengthen global efforts to protect the climate system, a case involving a compensation claim for climate damages could indeed present a court or tribunal with a unique chance to strengthen the formulation and implementation of primary rules for environmental protection.'[14] This is confirmed by Verheyen: 'If State responsibility claims were to mature and be adjudicated in international courts, major polluting States would be in danger of facing an enormous burden of costs and damages – even if only relative to their contribution to the problem. Such a claim for climate change damages would be largely unpredictable – especially if the claims were based on increased risk.'[15] This paragraph focusses on pathways for solutions that may be accepted on the basis of responsibility without liability.

Verheyen has convincingly argued that the way forward should be based on negotiation instead of litigation. Although,

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respuesta a la primera pregunta del Estado solicitante, la Corte opina que: [...] Los Estados deben velar porque su territorio no sea utilizado de modo que se pueda causar un daño significativo al medio ambiente de otros Estados o de zonas fuera de los límites de su territorio. Por tanto, los Estados tienen la obligación de evitar causar daños transfronterizos.' For a translation of the Advisory Opinion see Feria Tinta, Milnes February 26, 2018.

13 See § 7.3, 7.5.2 and 7.5.3.

14 Voigt 2008, p. 20-23.

15 Verheyen 2005, p. 337.

> 'the approach to liability for environmental damage fits the climate change phenomenon generally, and therefore, existing liability regimes can serve as examples for designing a climate change damage liability scheme. The underlying assumption is that it is preferable for the international community to tackle the issue of climate change damage by way of negotiation soon – rather than to wait for the reactions of people and countries at some point in the future when the impacts of climate change become more and more apparent (litigation-based approach).'[16]

A litigation based approach would result in some (few) affected parties (States or private entities) recovering their damage or being provided monies for adaptation purposes. Based on the no-harm rule and the duty to cooperate, she concludes that States have a general duty to ensure that an equitable solution is found. She concludes that: 'In the case of climate change damage, this means that people and countries injured by the impacts of climate change should be able to claim adaptation costs or compensation for residual damage regardless of their diplomatic or political capacity. Such scheme covering all potential victims of climate change can only be negotiated.'[17]

One of the frameworks in which compensation can be negotiated is the UNFCCC framework. The UNFCCC framework has increasingly acknowledged the connection between climate change and migration. However, as it stands today the regime has not dealt with compensation for forced migration. So far, the international climate regime has focussed on steps towards preventing climate change as a phenomenon and has not focussed sufficiently on the consequences of climate change.[18] It has incorporated the ambiguous term 'loss and damage', but it is unclear what the legal consequences of this concept are.[19]

Wyman made a very useful contribution in the debate to point out that apart from the rights gap, there is also a 'funding' gap. She describes this funding gap as: 'the lack of a dedicated source of international funding to help offset the costs that developing countries may incur in dealing with climate change migration.'[20] This gap may be remedied by international funds 'financed by developed countries to assist developing countries with the costs of climate migration.'[21] Another market-oriented solution to distribute the costs of climate change impacts that is supported by the international community is insurance.[22]

16 *Ibid.*, p. 364.
17 *Ibid.*, p. 363.
18 *Ibid.*, p. 336 and 337.
19 This will be discussed in § 12.3.1.
20 Wyman 2013, p. 169.
21 This will be discussed in § 12.3.2. See also Wyman 2013, p. 169.
22 See § 12.3.3.

12.3.1 Loss and damage

As has been mentioned above, the UNFCCC framework has adopted the ambiguous term 'loss and damage'.[23] Loss and damage refers to 'negative effects of climate variability and climate change that people have not been able to cope with or adapt to.'[24] This definition is really different from the definition of 'damage' in international law, for example the definition by the ILC.[25] To illustrate this, in the Paris agreement, adopted during the COP 21 in December 2015, it is specifically written that 'loss and damage' does not involve or provide a basis for any liability or compensation.[26] Kugler and Moraga argue that the concept of 'loss and damage' is substantially useless with regard to reparation under international law because it is too ambiguous.[27] It does not therefore close any rights gaps and is not likely to do so in the future, as some States made very clear that loss and damage does not involve or provide a basis for any liability or compensation.

12.3.2 Compensation funds

As has been mentioned above, compensation funds should 'help offset the costs of climate migration, especially in the developing world.'[28] As most migration will be internal, it would be logical to cover this type of migration under the compensation fund. However, this is 'a matter typically regarded as falling within the purview of nation States.'[29] Mayer therefore argues that it would be best to adopt a horizontal approach in which financial support would be provided to developing States that incorporate vulnerable populations and are responsible for protecting them. He further supports his argument by pointing out that:

> 'attributing loss and damage at the individual level is particularly challenging, whereas horizontal approaches allow consideration of probabilistic harm and compensation through bundle payments', and (2) 'horizontal approaches are more suitable for pursuing goals such as economic efficiency, the reduction of loss and damage, the creation of an incentive for climate change mitigation, and broader goals of social justice'.[30]

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23 Kugler, Sariego 2016, p. 103.
24 Warner, Geest van der & Kreft 2013, p. 10.
25 See § 7.1.1.
26 Paris Agreement, Decision 1/CP.21 2015 FCCC/CP/2015/L9/Rev1 para 51, p. 8. See also Kugler, Sariego 2016, p. 104.
27 Kugler, Sariego 2016, p. 103.
28 Wyman 2013, p. 181.
29 *Ibid.*, p. 181.
30 Mayer 2014.

If the problems with determining who will be compensated for what can be somehow overcome, Wyman has identified four possible sources of funding that might be useful for addressing climate migration: 'existing funds for migration (such as the International Organization for Migration's Development Fund),'[31] disaster relief resources (such as the United Nations Central Emergency Response Fund and Asian Development Bank's Asia Pacific Disaster Response Fund), development assistance[32] and climate change funds.[33] Disaster relief resourced can often be found on the national level.[34] However, as the most affected States are often not high-volume emitters, these funding schemes do not automatically solve issues of distribution. Another disadvantage is that it also does not address the root causes of environmentally forced migration.[35] These disadvantages are avoided under development funding, when assistance is used to reduce vulnerability to environmental degradation and therefore reduce the extent of forced dislocation (sustainable development). Wyman suggested that even

> 'adaptation funding sources under the UNFCCC could be used to "complement" development assistance from the major donor agencies, as development is framed as adaptation. She also points out that adaptation funds established under the UNFCCC also potentially could be used to finance resettlement and relocation costs, assuming again that it is possible to tie these costs to climate change.'[36]

A prominent example of funding under the UNFCCC is the Adaptation Fund, which is established by the parties to the Kyoto Protocol.[37] Even though, to date it has not approved projects which appear to concern migration directly, the Fund's board has 'the authority to establish a window within the Fund for climate migration, or a "substructure" or "facility" for climate migration under the adaptation window. [This] could provide the first dedicated multilateral source of funding for climate migration.'[38] Support for this course of action can be found in the Cancún Adaptation Framework that invites the Parties to undertake '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration

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31 Wyman refers to a recent report from the Asian Development Bank that states that, '[t]he IOM Development Fund [...] has funded and is funding pilot migration and climate change and environmental projects in Egypt, Mauritius, and Kenya.' Wyman 2013, p. 181.

32 Wyman includes this source, as she argues that 'climate migration is an issue that should be addressed in part by reducing pre-existing vulnerabilities'. *Ibid.*, p. 181.

33 Wyman 2013, p. 181.

34 'Such as the Mexican catastrophe reserve fund, FONDEM and Costa Rica, Nicaragua and Honduras also have or intend to create national funds.' In Verheyen 2005, p. 344.

35 *Ibid.*, p. 344.

36 Wyman 2013, p. 211 onwards.

37 *Ibid.*, p. 184.

38 *Ibid.*, p. 181.

and planned relocation.'[39] It can be argued that by recognizing migration as a type of adaptation, it 'invites funding for migration related issues within the context of increased action on adaptation,' even though 'it does not impose any obligations on States in relation to migration, such as assisting developing countries with the costs of climate migration.'[40]

Also the Parliamentary Assembly of the Council of Europe called for enhanced co-ordination, mediation and funding to support action to be taken at local, national and international levels in order 'to take a proactive stance to better identify and anticipate the impact of climate change on population movements.' It suggested that:

> 'consideration should be given to the establishment of an international solidarity fund to provide protection to people forced to migrate due to climate disasters. Co-operation with the Council of Europe Development Bank (CEB) could be considered, in accordance with the Declaration on European Principles for the Environment signed by the CEB on 30 May 2006 together with the European Commission and several other international financial organisations (the European Investment Bank, the European Bank for Reconstruction and Development, the Nordic Environment Finance Corporation, the Nordic Investment Bank) in a joint effort to implement the fundamental right of present and future generations to live in a healthy environment;'[41]

In general, the use of development assistance, migration, and disaster relief funding sources avoids the problems with establishing a causal link between (man-made) climate change and migration. However, Wyman pointed out that:

> 'developing countries are likely to be concerned that developed countries will evade their responsibility for helping with adaptation if climate migration is addressed using existing funding sources for development assistance, migration, and disaster relief, even if the idea is to use better financed versions of these sources. Using non-climate funds to meet needs related to climate change might be regarded as undermining the idea that developed countries have special obligations due to their responsibility for climate change. In addition, developing countries are unlikely to support using development institutions to distribute funding, because developing countries have little control over the governance of these institutions.'[42]

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39 UNFCCC, Cancun Agreement, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November – 10 December 2010, Cancun, 2011. FCCC/CP/2010/7, at II para 14f.

40 Wyman 2013, p. 183.

41 Parliamentary Assembly of the Council of Europe, Resolution 2307 (2019) A legal status for "climate refugees", Text adopted by the Assembly on 3 October 2019 (34th Sitting), para 5.3.3.

42 Wyman 2013, p. 214 and 215.

Developing countries likely would prefer to use climate adaptation funds. This would however limit protection of environmental refugees to those who are affected by climate change[43] and who can establish this link.[44]

Verheyen sums up some of the difficulties that have to be overcome in the context of victim compensation funds that can also be applied to other types of funding. She argues that if the compensation fund is a State-based-system:

> 'it would carry the disadvantage of having to make as the definition of covered areas and injuries, thresholds of damage, contributions from public budgets to a fund "up front" and the ensuing institutional problem of administering (and investing) the monies in the fund. Nevertheless, despite the fact that many details of such a scheme would have to be agreed, and then possibly separately for the various likely impacts of climate change, does not preclude the usefulness of such an approach per se.'[45]

12.3.3 Insurance

Another market-oriented solution to distribute the costs of climate change impacts that is supported by the international community is insurance. Two types of instruments are conceivable: liability insurance (purchased by the person creating the risk or causing the damage) and 'weather' insurance (purchased by individuals or entities to protect the value of their property).[46] Even though the liability insurance was not designed to protect victims (but to 'increase the utility of a risk averse injurer'),[47] it can be used in the context of environmentally forced migration based on the notion of joint and several liability.[48] Verheyen refers to the example of the EC environmental liability scheme. The directive[49] is

> 'based on a public law approach and focuses on contaminated sites. It establishes strict liability for damage to land, water and biodiversity from specified activities and fault-based liability for damage to biodiversity from other "occupational"

43 For an analyses on the differentiation between damage brought about by anthropogenic climate change and natural variability, and how a solution might be negotiated, see Verheyen 2005, p. 362.
44 Wyman 2013, p. 211 onwards.
45 Verheyen 2005, p. 345.
46 *Ibid.*, p. 359.
47 *Ibid.*, p. 359.
48 Verheyen 2005, p. 354.
49 Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage of 21 April 2004, OJ Nr. L 143/56.

> activities. The proposal foresees that, when a damage is caused by the actions or omissions of several operators, they are jointly and severally liable.'[50]

For 'weather' insurance, Verheyen pointed out: 'in the case of climate change, and for extreme weather events in particular, an agreement about mandatory "weather" insurance coverage is conceivable, where individuals or regional authorities would insure against certain types of extreme weather events on the private market, while the premiums would be paid by polluters/operators/States.'[51] These systems are especially conceivable for sudden-onset disaster, such as weather extremes, 'given that extreme events are likely to cause havoc and endanger human lives.'[52] These systems are more complicated for slow-onset degradation as these lack the clear damage in a certain point of time, but unfold themselves over a longer period of time. These 'gradual changes such as gradual coastal inundation due to sea level rise might be better regulated through a scheme based on a joint fund.'[53]

In practice, the UNFCCC released a Clearing House for Risk Transfer platform, to connect insurers and vulnerable populations, and to provide technical assistance to countries seeking to implement new risk solutions.[54]

50 Verheyen 2005, p. 354.
51 *Ibid.*, p. 359.
52 *Ibid.*, p. 359.
53 *Ibid.*, p. 360.
54 Abramskiehn 2018.