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

Vliet, J.M.M. van der

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Author: Vliet, J.M.M. van der

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14 | A context-oriented and dynamic interpretation for different types of environmental refugees

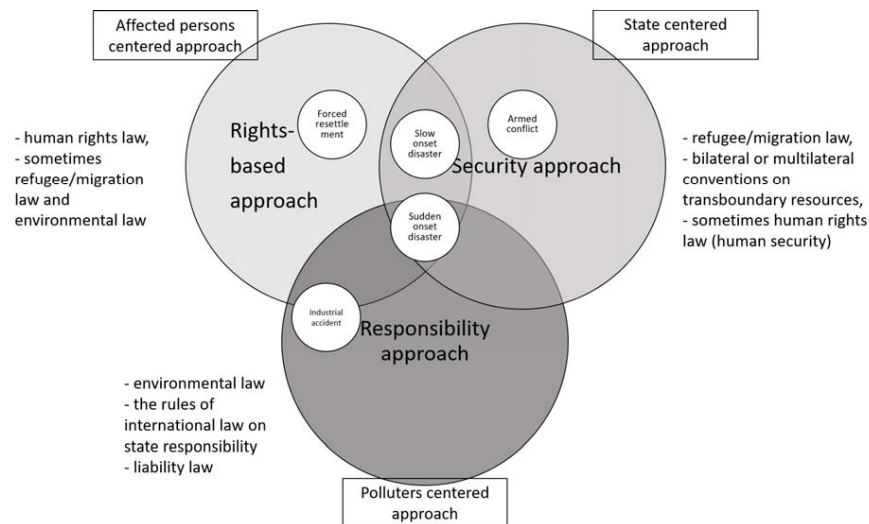
The analyses in Part II has demonstrated how the different types of environmental refugees are protected under the various approaches. Based on this analysis, it can be concluded that different types of environmental refugees are best protected under different approaches (even though the other approaches may provide with additional protection, as regimes can be overlapping). Instead of opting for one of the approaches as a main protection strategy, this paragraph suggests that in order to aim for best protection, it is required to use all approaches in a fluid way.¹ A fluid approach can offer more than just a broadening of legal protection regimes. The difference in approaches is a highly relevant difference that should be considered by legal practitioners, as the approach determines the expectations that one holds from the law and provides a framework in which complementary norms are bargained. A different approach thus leads to a different logical solution and thus preselects possible legal outcomes. This fluid approach can best be achieved through a *context-oriented and dynamic interpretation*.² As Kolmannskog and Trebbi argue: 'It is important to interpret law with a view to the ever-changing environment in which it must be applied.'³ This paragraph will further draw possibilities for such a context-oriented and dynamic interpretation for different types of environmental refugees.

1 The findings in this paragraph have been published in Vliet van der 2018.

2 Kolmannskog, Trebbi 2010, p. 729 and 730.

3 *Ibid.*, p. 729.

Figure 13: Schematic overview of the different types of environmental refugees and how they relate to the different approaches



14.1 SUDDEN ONSET DISASTERS

As demonstrated in § 4.1, sudden-onset disasters are best protected by the home State under a rights-based approach. The rights-based approach offers a generally accepted framework of rules that apply to everybody at any time, therefore including those forcedly displaced by sudden-onset disasters. Under the responsibility approach, those affected by sudden-onset disaster may invoke the responsibility of polluters in cases where there is a (proven) causality between their actions and the (non-natural) disaster (caused by or aggravated by human actions). This causality is hard to construct. The security framework will generally not offer solutions for sudden-onset displacement, as generally they affect only parts of the country. This leaves other parts of the country available as internal flight alternatives, therefore impeding protection obligations of third States. Only in case of serious sudden-onset disasters in border areas, third States may be willing to provide access and stay based on humanitarian considerations.⁴

In general, those internally displaced are covered under the scope of the UN Guiding Principles on Internal Displacement and subsequent frameworks

⁴ See § 6.1.3.

and operational guidelines, as long as the migrants were forced or obliged to flee. This element of force is relatively easy to establish in case of large-scale sudden disruptions of the environment that acutely impact areas, such as big typhoons or floods. More debatable are less devastating disasters that occur frequently. If frequent, disasters prevent the possibility to earn a living and support the family. Can this still be framed as forced migration, or is this a voluntary economic type of migration? This will have to be determined in future on a case to case basis.⁵ In these last circumstances, the IDPs have to fall back on the general human rights framework to protect them. As Wewerinke-Sing and Van Geelen have argued in the context of climate change: 'international human rights [...] has its own mechanisms of implementation that can be used to address climate change.'⁶ International human rights law provides obligations to protect peoples and individuals against forced displacement resulting from environmental degradation. However, this obligation is limited, as was considered by the ECtHR:

'where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. [...] In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy. This consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.'⁷

Further, in particular for forced migration due to various small-scale events, it will be very challenging to prove that a State is required to take positive action.

As a protection mechanism, a rights-based approach also does not respond adequately to pre-emptive movement and the effects of adaptation and mitigation measures are often overlooked. The responsibility approach may address this by redirecting the focus to the cause of the forced migration: the environmental degradation itself. The responsibility approach can also offer ways to

5 For example, principle 29 of the Guiding Principles states that 'Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation' or the Inter-Agency Standing Committee, 'IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters' 2011, or the Framework on Durable Solutions for Internally Displaced Persons.

6 Wewerinke-Singh, Van Geelen 2018, p. 691.

7 ECtHR, *Budayeva and others v. Russia* 2008, para 134 and 135.

address the responsibility of polluting States. However, proving causality between pollution and migration due to sudden-onset disaster will be far from straightforward (even though it is easier to establish than with slow-onset disasters). Possibly, commitments as reflected in NDCs (under the UNFCCC) can be used as a baseline in the assessment of States' compliance with their human rights obligations.⁸ At a minimum, the responsibility approach can strengthen – if not the legal – the moral obligation for polluting States to contribute to solutions for climate related slow-onset disasters in affected countries. Apart from the possibilities for State liability, the UNFCCC and its protocols may provide finance mechanisms for adaptation or mitigation, therefore addressing the lack of anticipation possibilities under the human rights framework. Also, human rights and environmental rights can mutually reinforce each other, for example in the right to a healthy environment. The security approach can offer cross-border protection for sudden-onset disasters on a humanitarian basis. This protection may be strengthened by emphasizing the human rights implications (which may result in a human rights-based non-refoulement). Especially in the context of sudden-onset disasters due to climate change, a security approach can also be instrumental in establishing the causal link between the pollution and the forced migration, as this approach is familiar with future risk assessments and there seems to be a consensus on the links between environmental degradation and migration.

14.2 SLOW-ONSET DISASTERS

Despite the long timeframe for action (due to the slow-onset character of the disasters), victims of slow-onset disasters are generally considered to suffer from the biggest protection gap. The main reasons for the protection gaps identified for environmentally forced migration due to slow-onset disasters are: (a) the lack of a clear causal relation between the environmental degradation and the reason to migrate; and (b) the lack of a clear element of force in the decision to migrate. 'Slow onset disasters will lead to a tipping point at which people's lives and livelihoods come under such serious threat that they have no choice but to leave their homes. But even before the tipping point is reached, many people will decide to leave in anticipation of worse to come or in order to improve their economic situation which has become dire amongst other factors due to environmental degradation.'⁹ It is virtually impossible to determine exactly at which point people's lives and livelihoods come under such serious threat that the migration should be considered forced. In general, those who move primarily due to gradual environmental degradation are often poorly visible as they leave often not in large numbers over a

⁸ Wewerinke-Singh, Van Geelen 2018, p. 691.

⁹ Vliet van der 2018, p. 21.

longer period of time. The degree of force in the migration may also be considered differently at the different stages of gradual environmental degradation. For those displaced by slow-onset disasters there may therefore be operational and normative protection gaps, internally and internationally, because they risk being considered economic or voluntary migrants.¹⁰

The approach that offers the best protection possibilities for slow-onset disaster related migration is the rights-based approach. This approach suffers the least from the aforementioned causes of the protection gap. As the human rights framework focusses on the violation of basic rights as such irrespective of the cause of the violation and the nature of the movement (voluntary or forced), it applies to all types of migration due to slow-onset disasters. For this reason, the rights-based approach often assumes the movement to be forced. The human rights framework may provide access to Courts in order to address environmental degradation. However, apart from a general obligation to promote human rights, it is difficult to enforce human rights. Environmental degradation clearly affects human rights, but violations of these rights are difficult to demonstrate. Also, the human rights instrument is a responsive instrument that does not allow for early mitigation and adaptation, while in reality slow-onset disasters provide a unique opportunity to do so due to their gradual character.

The security approach offers little options for those forcible displaced due to slow-onset disasters. In general, they will be considered as economic migrants and access and stay will be restricted. 'Human rights law has expanded States' protection obligations beyond the "refugee" category, to include (at least) people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment [complementary protection]'.¹¹ However, for now, human rights violations caused by environmental degradation are as such highly unlikely to give rise to a non-refoulement obligation.¹² When slow-onset disasters may affect peace and stability

¹⁰ Kolmannskog 2008 executive summary.

¹¹ McAdam 2012, p. 53.

¹² 'In the case AC Tuvalu [2014] NZIPT 501370-371, the Immigration and Protection Tribunal New Zealand has accepted that exposure to the impacts of natural disasters can, in general terms, be a humanitarian circumstance that could make it unjust or unduly harsh to deport. Nevertheless, in such a case the appellant must establish not simply the existence of a matter of broad humanitarian concern, but exceptional circumstances of a humanitarian nature such that it would be unjust or unduly harsh to deport the particular appellant from New Zealand. It will be hard to meet this threshold. However, the judicial decision stipulates that if return is not possible, permissible or reasonable due to circumstances in the place of origin and personal conditions, a person should receive protection.' In Vliet van der 2014, p. 170. In para 32 the Court considered: 'As for the climate change issue relied on so heavily, while the Tribunal accepts that exposure to the impacts of natural disasters can, in general terms, be a humanitarian circumstance, nevertheless, the evidence in appeals such as this must establish not simply the existence of a matter of broad humanitarian concern, but that there are exceptional circumstances of a humanitarian nature such that it would be unjust or unduly harsh to deport the particular appellant from New Zealand.'

in certain regions, security aspects may come into play. Slow-onset disasters have the potential to destabilize regions and cause conflicts over reclining resources.¹³ The political will to address slow-onset disasters may rise, and possibilities for mitigation and adaptation may be created.

The responsibility approach may provide with funding of mitigation and adaptation measures for slow-onset disasters through the UNFCCC finance mechanisms. Possibly also the migration itself may be funded if it is considered an adaptation strategy (even though these finance mechanisms are not designed to deal with migration). Under the responsibility approach, the slow-onset disaster may benefit from the larger window of opportunity to address the root of the problem. It may respond more accurately to pre-emptive movement and may stimulate ways for safe, orderly and regular migration. Possibly, commitments as reflected in NDCs (under the UNFCCC) can be used as a baseline in the assessment of States' compliance with their human rights obligations.¹⁴ A big limitation under the responsibility approach however, is that it suffers from a double problem of causation: causality between the movement and the degradation, and the chain of causality between human actions and slow-onset disasters. This seriously limits the possibilities for State liability. However, the narrative of the responsibility approach can at a minimum contribute to the moral obligation of polluting States to contribute to a solution.

The situation might be slightly different for SIDS. At some point questions on causality between the environmental degradation and the migration will no longer exist, and it will be evident that the migration is forced. Supported by a human rights framework, this will enhance protection possibilities for cross-border migration (non-refoulement). Another relevant aspect is that SIDS raise questions that are relevant under a security agenda, such as questions on sovereignty, nationality and ownership over resources (in particular in the seabed). This particular type of slow-onset degradation is therefore much more likely to be considered under a security approach.¹⁵ Some argue that under these circumstances there is a responsibility to protect.¹⁶

14.3 ARMED CONFLICT

Armed conflict is best covered under a security approach. The conflict itself is generally accepted as a basis for protection. International humanitarian law provides internal protection and widespread violence generally suffices for

¹³ See § 6.3.

¹⁴ Wewerinke-Singh, Van Geelen 2018, p. 691.

¹⁵ 'Interestingly, the UNFCCC and the Kyoto Protocol both consciously ignore issues pertaining to the potential loss of sovereignty or statelessness caused by climate change-related impacts.' In Limon 2009, p. 455.

¹⁶ See § 10.3.3.

access to third countries based on regular national migration laws. The protection of forced migrants from a security perspective is mainly a remedial mechanism. For these protection mechanisms, there is no added value in framing a conflict as caused by environmental degradation.¹⁷ However, from the perspective of prevention, it may be useful to frame a conflict as being caused by environmental degradation. For example, conflicts over shrinking or growing resources may be prevented altogether if preventive action is taken on time. For example, by concluding bilateral or multilateral agreements on the use of resources. The rights based-approach may be instrumental in expanding third countries' protection obligations beyond the 'refugee' category (non-refoulement). Armed conflict is generally not considered under the responsibility narrative.

14.4 ENVIRONMENTAL CONTAMINATION

Environmental contamination is best covered by the responsibility approach. Under the responsibility approach the focus will be on the prevention of environmental degradation or compensation for damage. In case of less environmental degradation, less people will be forced to migrate, thus addressing the problem at its root. In the context of environmental degradation and transboundary damage, the law of State responsibility can 'support primary rules established by treaties or customary law which aim at preventing environmental damages and, second, provide injured States with a right to restitution and compensation.'¹⁸ Breaches of human rights due to environmental contamination may be invoked for national courts to strengthen liability claims, or may serve to get access to justice through human rights courts. A rights-based approach can also help to determine the effect of environmental contamination on humans. The security narrative is not relevant for environmental contamination, unless it is a global contamination with major effects on the peace and security such as climate change. Under those circumstances, the political will to address environmental contamination may rise, and possibilities for mitigation and adaptation may be created.

17 In the literature there is a growing interest for environmental degradation as an underlying cause for conflict. See for example Hsiang, Burke & Miguel 2013.

18 Voigt 2008, p. 2 and 3. 'There is, however, little empirical evidence that State responsibility for environmental damage has been regarded by States as a positive inducement to preventing damages or as a means for restoration or compensation. One example is the Chernobyl accident, which caused significant harm to a number of Northern European countries, none of which attempted to claim compensation from the Soviet Union.' In Voigt 2008, p. 3.

14.5 PLANNED RESETTLEMENT

Forced resettlement or development displacement is governed by various guidelines. It differs from other types of climate refugees because the timing of displacement is fixed and planned and somebody or some institution is responsible for a correct execution of the resettlement. The emphasis of the regulation of forced resettlement is that the rights of the people forcibly displaced are respected. This type of migration is therefore best covered by a rights-based approach. For forced resettlement, the security approach offers no useful platform, as it is perceived as an internal situation that does not affect third States (unless there is a spill over effect to neighbouring countries, for example for SIDS). Forced resettlement will generally not be considered under the responsibility approach, other than from the perspective that somebody or some institution is responsible for a correct execution of the resettlement.

Planned resettlement can be very beneficial as an adaptation strategy. If lands no longer sustain certain groups of people, the migration of some or all of these people may be a demonstration of the ability to migrate and to take control of the situation. Rights-based considerations can underscore the minimum values of treatment that these migrants need to be provided with before, during and after transit. Those displaced should have a strong input in the selection of who will move where and at what time. Various legal guidelines prescribe what minimum (especially procedural) rights should be met, in particular for indigenous peoples with a strong attachment to the land or other vulnerable groups (e.g. women, children, disabled). Regional Human rights tribunals have ruled several times in favour of indigenous groups that had their traditional land polluted or claimed for other purposes.¹⁹ However, the enforcement of these judgments is difficult in practice. These cases do demonstrate that a violation of environmental law (responsibility approach) that affects either individual or group human rights (rights-based approach) may prevent migration if the pollution is properly addressed. The security approach can be relevant when migrants seek legal routes to migrate to other countries, for example through labour migration schemes or education programmes. If the procedural guidelines are adhered to, it is unlikely that planned relocation will cause instability in the region through conflicts with earlier residents of the area of resettlement. In that context, the security approach will not be very relevant.

19 For example in the cases ACmHPR, Centre for Minority Rights Development Kenya and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya 2010 and ACmHPR, Social and Economic Rights Action Centre vs Nigeria 2001.