Defining risk areas and protecting land rights in a context of climate-related relocation: input for the HRC56 thematic report on climate change and internal displacement

Jacobs, C.I.M.; Ribeiro de Almeida, B.

Input for the HRC56 thematic report on climate change and internal displacement

Defining risk areas and protecting land rights in a context of climate-related relocation

Carolien Jacobs and Bernardo Almeida, Van Vollenhoven Institute for Law, Governance and Society, Leiden University, the Netherlands

A growing number of people are at risk of the adverse effects of climate change and disasters . To reduce these risks, governments increasingly consider planned relocation: to remove people from high risk areas to safer places, and the importance of this strategy of risk reduction is recognized within international climate policies (Bower, Weerasinghe and Mokhnacheva, 2022). Planned relocation is a complex and long-term process and it is widely acknowledged that it requires careful preparation and community engagement to increase the likelihood that people are relocated in a durable manner (Durand-Delacre *et al.*, 2023). The forward looking orientation of planned relocation brings the focus to questions such: How to find suitable places for relocation? What is needed to convince people to move elsewhere? How can lives be rebuilt in a durable way?

Our reflection note intends to take a step back and draw attention to the period preceding planned relocation, when an area is assessed as not suitable (anymore) for habitation, cultivation, or other uses, while a new and supposedly safer area is chosen for relocation. The realization that an area is no longer habitable may come from a community itself, but more often, it is a rather top-down, state-led decision which at most engages community members in the planning of the relocation. Yet, the acceptable level of risk is a subjective and individual judgment, dependent on exposure to risk but also criteria such as alternatives to livelihoods and people's attachment to land. Recent comments have emphasized the importance of conceptualizing risks and habitability in a participatory manner, paying attention to diverging perceptions, including people's preferences to not move (Piggot-McKeller *et al.*, forthc.; Farbotko *et al.*, 2023).Moving might not bring a better life. Moreover, planned relocation can have serious consequences on the land rights, both for those who move, but also for those whose land is being used for relocation. Finally, other factors not related with risk, such as cheap access to land - especially when strategically located - might also play a role in the classification of risk areas and identification of safer relocation places

In this reflection note, we take a socio-legal perspective to draw attention to the thorny sides of mapping risk areas and identifying safer locations for relocation. Both need to be done in a careful manner to avoid violation of fundamental rights of those who are relocated and of hosting communities. Drawing on the case of Mozambique, this note underlines the importance of promoting clearly defined legal frameworks and carefully designed administrative processes to provide orientations to governments for an approach based on both rights and needs . Whereas international organizations have been incentivising governments to develop National Adaptation Plans as a way to identify 'medium-and long-term adaptation needs at a national level and developing and implementing strategies and programmes to address those needs' (UNHCR, 2018: 7), these plans are not enough to protect the rights of those affected. Further realization of such plans will need clear and protective laws and administrative procedures (IFRC/UNDP, 2015: 16).

The case of Mozambique is relevant because it is one of the countries most affected by climate change (Eckstein, Künzel and Schäfer, 2021: 8). Besides, government-led relocations have repeatedly taken place in the country's history; as part of colonial estate schemes, villagization and socialization policies, large-scale development and investment projects, or nature conservation (Jacobs and Almeida, 2020). In more recent times, relocation has taken place in the aftermath of major cyclones, such as cyclone

Idai in 2019, when around 88 000 individuals were relocated to 66 newly established permanent relocation sites (IOM/INGC, 2019).

Risk areas

To protect people from risks and impacts related to disasters, environmental change and climate-related hazards and vulnerabilities, governments need to have a good understanding of risks. Risk assessments, and legal instruments such as land use regulations, construction standards and land use plans may be of help to assess and reduce risks. Identifying an area as a risk area can provide a strong legal instrument to governments to develop risk reduction measures.

At present, the concept of 'risk areas' is referred to in various pieces of Mozambique's legislation and policy frameworks, but it is nowhere clearly defined, not in legislation on spatial planning,[1] nor in legislation on disaster risk management.[2] Art. 22.1 of Decree 76/2020 however states that '[t]he mapping of risk areas aims to identify, locate and trace geographic contours of resources, infrastructures and populations in a region exposed to a possibility of being affected by hazards'.[3] Moreover, the process through which risk areas are classified and the competence to do so is also not clearly established in law. Although it is not exactly clear when an area is classified as a risk area, nor how and by whom they are classified, there are important legal consequences of this classification, most notably 1) the restriction to occupy or acquire land use and usufruct rights (DUAT; *direito de uso e aproveitamento da terra*); 2) restriction on using the land in practice; 3) the possibility of forced removal; 4) restriction of service provision in these areas.

By giving politicians and state officials such unclear, arbitrary, and hefty power for classifying risk areas, this legal framework exposes people to much uncertainty and provides no incentives to make the assessment and management of risk a joint exercise of state and citizens. For instance, what may be an acceptable risk for one person, may not be acceptable for another person; If permanent living in an area is not allowed, it may still be fine for people to use a field for agricultural purposes on a less-than-daily basis. The case of Mozambique shows that classifying an area as 'risk area' is hence not straightforward, but requires careful consideration and may not be possible in an unequivocal manner.

Land rights

Once it is established that an area is a risk area, restrictions on land uses (e.g., residence) or total loss of land rights are imposed. This raises the question: To what extent are people entitled to compensation for their losses? Within the international climate regime, it has been established that planned relocation straddles the pillars of both adaptation and loss & damage, and that compensation may be needed (Mosneaga and Jacobs, 2022). However, within legal frameworks where the land rights of poor dwellers often receive little or no recognition by state law, and where expropriation laws and other dispossession mechanisms do not acknowledge the real value invested by dwellers on their lands, those accepting to be relocated often do it at a loss. Moreover, a similar process often happens at the relocation sites, where the rights and losses of those giving away land are poorly acknowledged by law, and little compensated in practice.

---

[1] Decree 60/2006 that regulates urban planning; Resolution 18/2007 that approves the Policy on Spatial Planning; Law 19/2007 on Spatial Planning; and Decree 27/2008 that regulates the Law on Spatial Planning.
[2] Law 10/2020 which establishes the Regime for Management and Reduction of Disaster Risks and Decree 76/2020 that further regulates this law.
[3] Despite lacking a definition of risk area, Decree 76/2020 classifies risk areas into high-, medium-, and low-risk, and determines that separate manuals will guide this classification (art. 22.2; 22.3). To our knowledge no manuals were approved.

Again, taking the example of Mozambique, several issues need to be carefully considered in this regard, as we have argued elsewhere (Almeida and Jacobs, 2022). A first point of attention is that in many areas of the world, including Mozambique, large parts of the population may lack formal titles over their lands, but their rights are based on customary, non-state agreements and communal recognition of ownership. According to the 1997 Land Law, all land in Mozambique belongs to the state, but people can have rights of use and usufruct, also on the basis of customary rights, or if they can prove occupation in good faith for more than 10 years (art.12, Law 19/1997). However, this approach to land rights is undermined by regulations and weak rule of law, which in practice allows state officials to ignore the rights of dwellers of informal settlements (ibid: 3). In case of a disaster like Cyclone Idai in 2019, we found that the only compensation which people received was a residential plot in one of the relocation sites and material assistance to rebuild their lives and livelihoods, but this was not based on a process of negotiation and consultation. Leaving risk areas would represent for many a considerable loss on their life investment in their houses and livelihoods.

In the absence of a clear legal framework on the management of risk areas and expropriation, which lay out the procedure to be followed, capacity to implement this procedure, and mechanisms to ensure a due process, people in risk areas may no longer face environmental risks when they are relocated, but they may face considerable losses if legal safeguards are not in place to protect and acknowledge their existing land rights prior to relocation, also if these land rights are based on customary law, and not on a formal land title.

Recommendations

In a context in which climate change is increasing risks of extreme weather events, planned relocation may be a way to reduce risks. But planned relocation is a process that does not start with the actual relocation and preparation of the relocation site: it is not only about looking at the future, but also looking at the actual situation: Who is using a risk area; how do these users assess these risks themselves; and to what extent is some type of usage possible considering the risks levels? It requires careful consideration of what is considered a risk area, by whom, and for what. People's attachments to a particular part of land may be strong, for social, economic, emotional, or religious reasons, and it may not always be necessary to prohibit every type of land use in a risk area. A participatory approach to map risk areas may be a first step in ensuring tailor-made solutions that are accepted by the people affected. Next, the classification of risk areas may still allow some modes of use. This would then require a clear regulatory framework, accompanied by enforcement mechanisms to implement this framework.

Secondly, in relation to land rights and expropriation of people's land as part of relocation processes, we urge governments to adopt proper legal frameworks to provide guidance on how to improve the recognition of land rights and regulate expropriation, but also to ensure that the government has appropriate capacity to implement this legal framework. This can be of help in ensuring that legal certainty is guaranteed, the rule of law is followed, and that no unlawful dispossession takes place.

Bibliography

Almeida, B. and Jacobs, C. (2022) 'Land expropriation – The hidden danger of climate change response in Mozambique', *Land Use Policy*. 123(September): 106408. doi: 10.1016/j.landusepol.2022.106408.

Bower, E., Weerasinghe, S. and Mokhnacheva, D. (2022) 'Mapping of planned relocation cases: a foundation for evidence-based policy and practice', *Forced Migration Review* 69 : 48–51.

Durand-Delacre, D. *et al.* (2023) *Integrating Planned Relocation in National Climate Action*. Bonn: United Nations University- Institute for Environment and Human Security

Eckstein, D., Künzel, V. and Schäfer, L. (2021) *Global climate risk index 2021*. Bonn/Berlin: Germanwatch. Available at: http://germanwatch.org/en/download/8551.pdf.

Farbotko, C. *et al.* (2023) 'Reclaiming open climate adaptation futures', *Nature Climate Change* 13(8): 750–751. doi: 10.1038/s41558-023-01733-1.

IFRC/UNDP (2015) *The Handbook on Law and Disaster Risk Reduction*. IFRC/UNDP

IOM/INGC (2019) *Mozambique: Tropical cyclone Idai Multi-Sectoral Location Assessment- Round x, IOM Displacement Tracking Matrix*.

Jacobs, C. and Almeida, B. (2020) *Land and climate change: Rights and environmental displacement in Mozambique*. Leiden, Leiden University.

Mosneaga, A. and Jacobs, C. (2022) 'Understanding human mobility in the global climate regime through a translocal lens', *Transnational Legal Theory* 13(2–3): 237–260. doi: 10.1080/20414005.2023.2171348.

Piggot-McKellar, A. *et al.* (no date) 'Navigating tensions in climate change-related planned relocation'. Unpublished manuscript.

UNHCR (2018) *Mapping of existing international and regional guidance and tools on averting, minimizing, addressing and facilitating durable solutions to displacement related to the adverse impacts of climate change, Task Force on Displacement, Activity II.4*. Available at: https://unfccc.int/sites/default/files/resource/WIM TFD II.4 Output.pdf.