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# Editorial

## Climate, justice and displacement: reflections on law, policy and the future of human rights in the climate crisis

The environmental and climate migration debate began more than three decades ago when the United Nations Environmental Programme published its report on 'environmental refugees'.[1] Early discussions proceeded largely unnoticed by the broader public until environmentalists started using the term 'environmental refugees' in the mid-1990s to demonstrate to decision-makers the vivid threat presented by inaction in mitigating man-made climate change.[2] Instead of yielding strong commitments to CO2 emission reduction, however, the security implications of climate migration drew attention from Western security agencies; perhaps because of their search for new tasks after the end of the Cold War. It took close to another decade for the projected 'threat' of people potentially migrating because of climate change from, allegedly, the global South to developed (main emitter) countries to transform into concerns for the migrants themselves.

Against this background, the first legal debates to gain a high degree of publicity clearly focused on 'climate refugees' and on the search for adequate modes of protection. The approaches advocated oscillated between the pursuit of a new convention on climate refugees and an amendment to either the Geneva Refugee Convention or to the UN Framework Convention on Climate Change (UNFCCC).[3]

These approaches, which can be called treaty approaches, did not prove viable for various reasons: in specific cases, it often proved empirically difficult to disentangle the triggers driving the movement of people, whether these were climate and other environmental causes – or economic ones. It therefore proved equally difficult to reach an agreeable definition of the term 'climate refugees' for legal and scientific purposes. Last but not least, there was no political appetite amongst states for a new or amended treaty – either under the refugee or the climate regime. Moreover, from a protection perspective, the debate initially placed a strong emphasis upon those who fled from natural disasters across international borders, with a high degree of focus on the especially visible example of environmentally-forced migrants from shrinking and submerging small island states (the so-called 'canary in the coalmine').

1. E El-Hinnawi, *Environmental Refugees* (United Nations Environmental Programme, New York 1985).
2. N Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43 BioScience 752.
3. F Biermann and I Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*. Global Governance Working Paper (2007) <http://www.sarpn.org/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf> accessed 16 November 2016; B Docherty and T Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 Harv. Envtl. L. Rev. 349; WBGU, *World in Transition: Climate Change as a Security Risk*. Flagship Report (German Advisory Council on Global Change (WBGU), Berlin 2007).


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Such emphasis, however, tends to limit the coverage of any related protection mechanism by excluding many of those affected by environmental and climate change. Such a conceptual framework fails to account, in particular, for the plight of those who are displaced internally in the context of sudden or slow-onset disasters and for whom existing protection for internally displaced people (IDPs) will need to be adjusted and improved. Nor can this type of understanding respond adequately to the plight of those who may require cross-border mobility to cope with environmental change without, however, looking for permanent refuge – those such as nomadic and semi-nomadic pastoralists. Finally, such a framework fails to account for those who are at risk of displacement and forced migration and who may actively choose mobility itself as a form of coping and adapting to environmental challenges. The latter strategy may involve labour migration as a mode of risk diversion and of expressing an autonomous form of adaptation as well as including – often state-led – planned relocation of communities from risk-prone to safer sites. It was the UN Refugee Agency and the International Organization for Migration which in 2009 finally set new directions for the debate in a joint workshop:[4] (a) a screening process for all existing protection regimes in order to identify specific protection gaps for environmental and climate migrants, and (b) considering migration positively as a form of adaptation, in line with the thinking developed by the migration and development debate.

The treaty approach neglected to cover another important category of IDPs related to climate change, namely those displaced *because of* climate policies, that is, persons displaced in the context of mitigation and in-situ adaptation measures. Given that such climate action often entails large-scale investments in renewable energy production or the protection of infrastructure such as dams, climate policy displacement has everything in common with development-based evictions. Often deprived of their access to land and to other natural resources, and facing serious problems of restoring their livelihoods, the displaced basically bear the social costs of achieving a public good: avoiding and adapting to climate change. This reality sheds new light on the question of climate, justice and displacement.

The UNFCCC strongly emphasizes the right of sovereign states to exploit their own resources – though sustainably – without defining what 'sustainability' is. Hence, the meaning of sustainability under the UNFCCC is subject to the definitional power of national regulations, which are often weak on social aspects and human rights. Again, it is particularly in developing economies with rich prospects for expanding renewable energy production where protection of citizens' rights is frequently weak, where most of those affected by climate policy injustice live – an exposure that exacerbates their greater vulnerability to climate change itself.

New ground has more recently been broken in order to address existing protection gaps. Attempts to develop soft law guidance for states involved in relocating displaced populations or those at risk of displacement and similar attempts to address cross-border displacement have produced the first fruits. Most prominently, the UN Refugee Agency has developed, with experts, the draft Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation[5] – while the

4. UNHCR, 'Summary of Deliberations on Climate Change and Displacement' (2011) 23(3) International Journal on Refugee Law 561, doi:10.1093/ijrl/eer020.

5. Brookings Institution, Georgetown University and UNHCR, 'Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation' (2015) <www.brookings.edu/~/media/research/files/papers/2015/10/07-planned-relocation-guidance/guidance_planned-relocation_14-oct-2015.pdf> accessed 16 November 2016.

Nansen Initiative[6] has dedicated itself to addressing cross-border displacement and cooperation between riparian states. These approaches put their main (though not sole) emphasis on the human rights duty of states towards their own populations. Simultaneously, legal experts have begun to inquire into the prospects and limits of extraterritorial state obligations (ETOs) – not least to bolster arguments for mainstreaming human rights into the UNFCCC. The question of ETOs is core to both determining the legal responsibility of main emitters towards populations affected by climate change in third countries and of states financing adaptation and mitigation measures in third countries, and which involve human rights violations.

Most recently, the COP-21 meeting in Paris witnessed intensified lobbying efforts to integrate human rights language into the negotiated agreement and to introduce human rights-based safeguards into UNFCCC mechanisms, including efforts by the Office of the High Commissioner for Human Rights. The Paris Agreement[7] has been hailed as a breakthrough for human rights and migration, as it specifically calls, in its preamble, for respecting and promoting human rights, including the rights of migrants, in all climate actions and establishes a Task Force on Displacement mandated to develop recommendations to address (the threat of) displacement and to facilitate adaptive mobility. Meanwhile the Sendai Framework for Disaster Risk Reduction[8] has been welcomed by human rights advocates for recognizing the need for a people-centred approach to disaster risk management and that the protection and promotion of all human rights, including the right to development, is integral to such an approach. Protecting the world's most vulnerable also fits well with the 2030 Agenda.

These three approaches, (1) developing human rights-based soft law to guide states' action on their own territory and to stimulate cooperation with neighbouring states, (2) investigating binding human rights ETOs in the context of climate change and climate policies, and (3) lobbying for the inclusion of human rights within the UNFCCC framework, are not mutually exclusive. Indeed, the three approaches are complementary, but face multiple obstacles. At the UNFCCC, COP-level opposition to human rights language and safeguards is significant, and simultaneously so fragmented that it is difficult to coordinate efforts and to build alliances. Soft-law approaches equally face difficulties gaining momentum and the acceptance of states. Moreover, the cleavages between safeguards, their operationalization and their application in the field can be enormous. Looking at existing case law, ETOs, though partly discussed as *de lege ferenda*, are still difficult to establish effectively.

The contributions to the present edition of the *Journal of Human Rights and the Environment* thoroughly reflect both the efforts and obstacles concerning attempts to anchor human rights effectively within the various options for governing displacement and migration in the context of climate change and climate policies. Ferris and Bergmann open the edition by exploring the possibilities of using soft law – rather than binding conventions or treaties – to uphold the rights of those who move or will move because of the effects of climate change. The authors offer an up-to-date overview of relevant hard and soft law (human rights, humanitarian and climate law) and high-level

6. The Nansen Initiative, 'Cross-Border Displacement in the Context of Disasters and Climate Change: A Protection Agenda (Draft for Consultation)' (2015) <https://www.nanseninitiative.org/protection-agenda-consultation/> accessed 16 November 2016.
7. UN, The Paris Agreement, 2015 <http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf> accessed 16 November 2016.
8. UNISDR, The Sendai Framework for Disaster Risk Reduction 2015–2030 <http://www.unisdr.org/we/inform/publications/43291> accessed 16 November 2016.

proposals aimed at improving protection of those displaced by natural disasters. The authors suggest a two-track approach in which soft and hard law complement each other to achieve the best for those affected, and point to the conducive role of soft law in developing binding protection regimes.

The dominant existing approaches to climate migration are further explored by Scott and Smith. Their article criticizes the 'migration as adaptation' agenda, including its rather technical approach to planned relocation, and locates the agenda within the broader 'neoliberal migration management' approach. Using the construction of the 'Site C' dam on the Peace River in northwestern Canada as the basis for their arguments, the authors further stress that the abstractionism of the mainstream approach negates the adverse fate of those affected by climate policies. They conclude that 'climate migration management' as mirrored in 'the dominant international legal order', can only lead to new inequalities and reflect colonial capitalism.

The next three articles, by Obergassel et al., Schade and Hofbauer respectively, continue to examine planned relocation, but from three very specific angles. All three contributions are the outcome of an interdisciplinary research collaboration, ClimAccount, which investigated three projects registered with the Clean Development Mechanism (CDM), namely the Barro Blanco Hydropower dam in Panama, the Bujagali Hydropower dam in Uganda, and one of the Olkaria geothermal power plants in Kenya, for the human rights impacts of the related involuntary resettlements. The ClimAccount project particularly examined the role and responsibilities of international actors, more specifically of the European Union and its member states, as financiers of climate action and as actors on the CDM Board. In sum, the research project explored the prospects for, and limits of, human rights in the protection of those displaced by climate projects, and considered how to improve access to justice and remedies for those who had been insufficiently protected.

Obergassel et al. provide an overview of how debates about safeguards for the CDM have developed since its inception. Discussing the findings of the three cases with respect to their CDM registration process, the authors demonstrate that existing procedures are almost meaningless with respect to the protection of human rights and human well-being, since they effectively leave the formulation and enforcement of social and environmental standards to the project's host state. The article further draws conclusions concerning how to proceed in order to improve the human rights performance of the CDM and its successor mechanism after 2020.

Schade's article focuses on the responsibilities of international actors financing such projects, which is an aspect of climate policy and climate finance entirely irrelevant for CDM registration. Based on the Olkaria case study, Schade's contribution analyses the due diligence of development banks, particularly of the European Investment Bank, as another way of protecting the rights of those affected by climate projects. Her analysis further enquires into ways to improve human rights due diligence and the human rights accountability of states owning development banks, here of the EU and its member states. Whilst the question of the legal liability of extraterritorial human rights obligations is only marginally touched on in Schade's contribution, it is at the very centre of the article by Hofbauer. Taking the Barro Blanco case, Hofbauer discusses the prospects and limits of international (human rights) law and jurisprudence to hold states legally accountable for human rights failures committed by, in this case, the national development banks they finance. An extended 'effective control' standard is core to her argument concerning the way to potentially overcome the barriers of human rights treaties to climate justice.

Adelman addresses the nexus of climate, justice and displacement in a rather different sense. His central concern is with the potential human rights implications of geoengineering – technological approaches to achieving 'fixes' to climate change,

which were favourably installed by the Paris Agreement despite bearing potentially problematic and irreversible consequences for the planet and human rights alike. The displacement lying at the heart of Adelman's contribution is, in a sense, a displacement of attention and focus towards technological solutions in a potentially hubristic register and away from the responsibilization of practices necessary to respond adequately to climate change as a question of justice and human rights.

The present issue of the *Journal* closes with a philosophical critique offered by Alizzi of the impediment to mass action in the context of human rights violations and environmental exploitation produced by the 'neoliberal' and its creation of feelings of distance. Alizzi introduces Inuit thinking and interconnectedness to land as a contrast to the logic of industrial capitalism. He holds out hope of people-led resistance to the logics of neoliberalism in the form of alternative approaches, including that of the peasant movement *Via Campesina* – which explicitly challenges neoliberal logic and draws on meaningful collective action – and the recently published Declaration on Human Rights and Climate Change.[9] The author concludes that exploitation and injustice will continue, indeed, for as long as our interdependency with the rest of nature is negated.

Accordingly, the edition moves at multiple levels of focus to address its central theme. The contributions, taken together, offer an extended reflection on the fraught dynamics, convergences and tensions between questions of justice and injustice, climate urgencies and themes of human displacement and connection to land, resources and living environments so powerfully raised by the climate crisis.

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9. Global Network for the Study of Human Rights and the Environment (GNHRE), Declaration on Climate Change and Human Rights <http://gnhre.org/declaration-human-rights-climate-change> accessed 16 November 2016.