HOW TO ENSURE ADEQUATE LEGAL PROTECTION FOR ENVIRONMENTAL REFUGEES

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ABSTRACT

The growing concern of the International Community for environmental degradation has recently culminated in the international recognition of the man-made nature of global warming and renewed international efforts to mitigate the consequences.In the light of these actual developments, a related aspect of the problem merits attention: What action should states take with regard to persons, commonly dubbed "environmental refugees".

There is an ongoing academic debate between scholars of various disciplines on different aspects of the issue. Due to divergent views on environmental degradation as a root cause of forced migration, a commonly accepted analytic definition of "environmental refugees" has yet to be reached. Consequently, methodologies and estimates of persons potentially displaced due to environmental factors vary considerably. Despite this empirical uncertainty, various authors have proposed to extend legal protection under international law to include "environmental refugees". It must be assessed whether such proposals are sound from a legal point of view.

To this end, the first part of this study will examine existing international regimes and trends of state practice. It will also be determined, which of those regimes would provide the most adequate framework for EDP protection. In this context, a distinction will be made between protection abroad and protection within the country of origin. For the former aspect, instruments protecting refugees as such on the international and regional level are relevant. Moreover, forms of protection not limited to refugees, such as human rights conventions or temporary and complementary protection regimes will be considered. The analysis of the second aspect will focus on rules and practice of protection and assistance available to

internally displaced persons (IDPs).

The second part of this study will adopt a de legeferenda perspective. Against the background of existing law and practice, different proposals of an international regime for EDPs will be critically discussed. It will be argued that an appropriate legal solution to the present problem must build upon existing international rules and practice in order to provide coherent and effective protection for EDPs.

Key Words: Environmental Refugees, Environmental harm , Non-entrée policies, Reliable guarantee, Conventions.

INTRODUCTION

The growing concern of the International Community for environmental degradation has recently culminated in the international recognition of the man-made nature of global warming and renewed international efforts to mitigate the consequences.In the light of these actual developments, a related aspect of the problem merits attention: What action should states take with regard to persons, commonly dubbed "environmental refugees", who are forced to leave their homes for reasons like increasingly frequent natural disasters or rising sea levels?

There is an ongoing academic debate between scholars of various disciplines on different aspects of the issue. Due to divergent views on environmental degradation as a root cause of forced migration,a commonly accepted analytic definition of "environmental refugees" has yet to be reached. Consequently, methodologies and estimates of persons potentially displaced due to environmental factors vary considerably. Despite this empirical uncertainty, various authors have proposed to extend legal protection under international law to include "environmental refugees". It must be assessed whether such proposals are sound from a legal point of view.

In order to avoid confusion regarding the use of the term "refugee", it is important to remember the fundamental distinction under international law between migrants and refugees. While states traditionally enjoy discretion to control the entry, residence and expulsion of aliens, they have a duty not to return those aliens specifically defined as refugees by the

Geneva Convention of 1951(GC51). Refugees are outside their country of nationality "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion", whereas migrants move to another country for other reasons. Therefore, someone simply leaving in search for better weather would be legally in the same position as the inhabitant of a small island state that is being submerged by the rising sea-level. However, it is legitimate to ask whether forced migrants, due to environmental or other grounds, deserve international protection.

The present analysis adopts the terminology proposed by IOM and UNHCR and employs the term "environmentally displaced person" (EDP) to denote forced migration on environmental grounds, whether or not of a cross-border dimension.

It must be underlined that the present study focuses on the legal dimension of the problem. Consequently, it will not engage in the debate on root causes or empirical evidence. Rather, it will assume as given the view of the proponents of legal protection, who affirm that EDPs exist and deserve protection. Those authors underline the large scale of movement due to environmental reasons and do not deny that such movement may occur internally or cross border. To evaluate the soundness of their proposals, it must be examined whether the existing or the envisaged legal regimes can provide effective protection for EDPs. This involves not only an assessment of the capability of those norms to produce the desired effect, but also of their effectiveness in the light of relevant state practice.

To this end, the first part of this study will examine existing international regimes and trends of state practice. It will also be determined, which of those regimes would provide the most adequate framework for EDP protection. In this context, a distinction will be made between protection abroad and protection within the country of origin. For the former aspect, instruments protecting refugees as such on the international and regional level are relevant. Moreover, forms of protection not limited to refugees, such as human rights conventions or temporary and complementary protection regimes will be considered. The analysis of the second aspect will focus on rules and practice of protection and assistance available to internally displaced persons (IDPs).

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present problem must build upon existing international rules and practice in order to provide coherent and effective protection for EDPs.

CHAPTER I

Existing Protection Regimes

1. Refugee Protection on the international level: the 1951 Geneva Convention

The first potential source of international protection for EDPs is the refugee definition under GC51. There has been considerable debate in doctrine about whether at least some victims of environmental harm could fit within its narrow scope. Despite initial claims to the contrary, there appears to be consensus among scholars that the social group ground is not applicable to victims of environmental harm. If this open-ended category cannot be used, environmental harm may only be a means and not a ground of persecution. The case of the deliberate destruction of the livelihoods of the Marsh Arabs in southern Iraq by the Hussein regime is a frequently cited example for the persecution of persons on convention grounds through environmental means. Like in other cases, a causal link between the persecution and the convention grounds must be established.

However, important obstacles stand in the way of considering environmental harm as a means of persecution. Firstly, such harm must reach a certain severity threshold. Secondly, it must entail a violation of essential human rights, which cannot derive from an environmental event as such but only from agents responsible for the harm. It might be easy to identify an agent of persecution if the displacement is due to the construction of development projects by the state or exploitation by multinational companies, but difficult in cases of industrial accidents or climate change, where causal links and immediate responsibilities are less clear. However, it has been argued that even the situation in which a government knowingly fails to prevent environmental degradation amounts to persecution. Against this, it is has been objected that a persecutory intent must be established. However, rather than intention to harm or negligent failure to prevent harm, the determining element remains the denial of adequate human rights protection by the state of origin.

Furthermore, the required individual assessment of the well-founded fear is not considered an adequate solution in the case of environmental damage that usually has an indiscriminate impact. Additionally, the definition requires a refugee to be outside of and unprotected by his country of origin. This would exclude those EDPs, who are internally displaced and those for whom an internal protection alternative exists.

From the above reasons it is obvious that the Convention is capable of producing effects only for persons fleeing conventional persecution, not for those bound to be displaced by the effects of climate change like natural disasters and environmental degradation. EDPs are only indirectly protected if they are at the same time convention refugees, either because environmental harm is used as a means of persecution or because they flee both persecution and environmental harm.

Furthermore, it is doubtful that the potential protection would be generously interpreted, in the light of non-entrée policies and restrictive state practice on refugee recognition. UNHCR notes falling numbers in asylum applications possibly linked to restrictive immigration policies, the most restrictive of which are pursued by developed states in Europe, North America, and Australia. However, strategies to deflect refugees are adopted globally.

2. Refugee Protection on the Regional Level

As the international refugee definition does not include EDPs, it must be assessed whether they fall under the extended regional definitions. These extended definitions were elaborated as a pragmatic response to the problem of large-scale displacement, in which an individual and subjective status determination proved unfeasible. Relevant instruments exist in Africa, Asia and Latin America and include "events seriously disturbing public order" as a ground of flight and entailing refugee protection.

2.1 The 1969 OAU Convention

As far as the OAU Convention is concerned, many authors consider the public order ground as flexible enough to include not only man-made events but also ecological changes, like diseases and famine. Other authors have argued that EDPs must be included because environmental crises disturb public order, especially by affecting public security and public

health. Against this, it has been objected that this ground relates to the maintenance of law and order, while natural disasters would be included only if any ensuing disorder was manipulated to the detriment of the population. Moreover, a severity threshold must be reached.

It must be stressed that these considerations are not always based on a systematic interpretation of the treaty. Such an approach has revealed that natural disasters are excluded from the public order ground for two reasons. Firstly, the technical meaning of "public order" is generally understood to include only human activities.Secondly, the other grounds included in the extended definition (external aggression, occupation and foreign domination) are all man-made. Therefore, according to a contextual interpretation eiusdem generis, the public order ground cannot include environmental events. A third argument, according to which natural disasters do not entail state responsibility and therefore exclude any duty on other states to grant asylum, is less convincing. Firstly, like in the case of non-state persecution, the public order may be disturbed by "accidental situations not necessarily based on deliberate State action" Secondly, the risk of harm and not state responsibility remains the crucial element in the duty to grant refugee status.

These theoretical considerations must be assessed in the light of relevant state practice. Most African states have incorporated the extended definition into national legislation. However, provisions implementing obligations under the OAU Convention were not relied upon in those instances, in which African states have granted temporary protection to victims of natural disasters. Furthermore, the general trend in state practice on protection under the extended definition has become more restrictive since the late 1980s. After generously applying the extended definition to fighters against colonial domination, states became increasingly reluctant do so outside the decolonisation context. Due to a multiple set of reasons, states have since tried to contain refugees in their countries of origin and showed reluctance in providing durable solutions. It has been underlined that African states are currently focusing on temporary protection and repatriation, with the result that refugees become increasingly dependent on aid, facing segregation in camps without any prospective of resettlement.

In the light of these developments, it must be concluded that African states do not intend the extended refugee definition to include EDPs, nor are they likely to extend refugee protection to

this category. Rather, it is likely that the outlined problems would be exacerbated in the case of large-scale movements of EDPs.

2.2 The 1984 Cartagena Declaration and the 2001 Bangkok Principles

Unlike the case of the OAU Convention, the other regional extended definitions are contained in legally non-binding documents. The Bangkok Principles on the Status and Treatment of Refugees of 1966 have been amended and revised until their adoption in 2001 by the Member states of the Asian-African Legal Consultative Organization. The final text eliminated the higher threshold that had been considered for the public order ground[68] and now reflects exactly the wording of the OAU Convention. Consequently, the above outlined interpretation may be applied, which would lead to the conclusion that EDPs are excluded from the scope of the Bangkok Principles. This is particularly relevant, as these Principles are considered to reflect the understanding of Asian states of whom to protect as a refugee.

Similarly, the Cartagena Declaration is considered to consolidate and extend regional customary international law. Although adopted only by a limited number of Latin American states, it codified what the Inter-American Commission on Human Rights has considered to be the refugee definition within the whole region. The particular context of massive human rights violations and generalised violence explains the broad scope of the extended refugee definition in Latin America. However, an authoritative commentary on the Declaration underlined out that only man-made causes were envisaged and that victims of natural disasters and economic migrants remain excluded.[76]This view is supported by the explicit reference to the OAU Convention.

In neither region, state practice indicates willingness to apply the extended definition to EDPs. Latin American states normally apply the extended definition in practice and more than 10 countries have incorporated it into domestic legislation. However, the public order ground has been limited explicitly by some countries in a way that would preclude the inclusion of EDPs.Many Asian states have not even ratified the GC51 or its Protocol[81] and did not adopt adequate implementing legislation on refugee status. In the light of restrictive immigration policies, fragile asylum systems and a deteriorating protection environment in Asia, it is unlikely that an extended definition would be applied EDPs.

The interpretation of extended refugee definitions and their application in practice has revealed that EDPs are and will most likely remain excluded from this legal framework in any region where an extended definition is applied. Most importantly, it has been pointed out that extended refugee definitions are usually applied in situations of mass-influx and outside any legal framework. Therefore, even if EDPs were covered, it is unlikely that the issue of environmental displacement would be treated in a systematic and coherent manner.

3. Other forms of legal protection abroad

The present section will explore, whether EDPs may benefit from non-refoulementobligations under international human rights law (IHR). Furthermore, it will be assessed to which extent EDPs are covered by complementary or temporary protection regimes.

3.1 Non-refoulement under IHR

The non-refoulement obligation under IHR is normally recognised only to prohibit the return of an alien to a risk of torture or inhumane treatment. Also the right to life has given rise to non-refoulement, but only in cases of extrajudicial executions or the death penalty. Therefore, EDPs could benefit from non-refoulement only if their situation was re-characterised as such an arbitrary deprivation of life or as a form of inhumane treatment. However, the threats to the life and socio-economic conditions of EDPs emanate from environmental degradation or disasters, which cannot be responsible for human rights violations. Thus, rather than amounting to an arbitrary deprivation of life, these factors negatively affect the ability of states to fulfil their positive obligations to protect and ensure human rights. Furthermore, the definition of inhumane treatment requires the involvement of a state official, which would exclude any harm of natural origin. Therefore, only an exceptional situation in which a state denies or fails to provide humanitarian assistance to victims of natural disasters could amount to inhumane treatment.

The case of EDPs raises the question whether non-refoulement requires a risk of human rights violations, for which the state of destination may be directly or indirectly responsible; or

whether it would be sufficient to establish a risk of harm deriving from environmental factors, which cannot engage state responsibility. Only the second alternative would benefit those EDPs, whose states are genuinely unable to protect and ensure their human rights. In this sense, the absence of adequate health facilities within the country of destination has been considered to entail a risk of ill-treatment sufficiently serious to prohibit the removal of a terminally ill AIDS sufferer. However, this reasoning requires exceptional individual circumstances, strictly linked to humanitarian concerns. Consequently, it would not help most EDPs, just as it is of no use for most AIDS victims.

Further obstacles would arise if other human rights gave rise to non-refoulementFirstly, most rights are qualified, unlike the absolute prohibition of torture, from which no derogation is allowed. Consequently, an additional balancing test between the individual and the state interest would be required. In these cases, it would be necessary to establish that the removal is disproportionate to the risk of the violation faced upon return. According to Noll, this test could depend on the severity of the violation and the probability of its materialisation.

Secondly, it would be especially difficult for EDPs to rely on economic and social rights, which are dependent on available resources and require states merely to "take steps" for their progressive realisation. This wording would render it difficult to determine a severity threshold and to assess the risk of violation, because available resources and the realisation of economic and social rights vary widely among states.

3.2 Alternative protection regimes

It has been shown that IHR will normally not prevent EDPs from being denied protection abroad. Therefore, the scope of additional regimes must be considered. In this regard, it is necessary to distinguish complementary from temporary protection.

Complementary protection regimes incorporate binding non-refoulement obligations outside the GC51, under an extended refugee definition or IHR, which have been shown to exclude EDPs. By contrast, temporary protection is a provisional solution to the practical problem of mass-influxes and remains discretionary.

These differences are reflected by the regional regimes within the EU. Subsidiary protection, as complementary protection is called in Europe, must be granted to eligible persons. By contrast, temporary protection is triggered by a discretionary decision of the Council and

does not entail individual rights. As a result, only a limited number of grounds of protection were included in the Qualification Directive; whereas the Temporary Protection Directive contains broader criteria, like generalised human rights violations. Neither of the criteria for subsidiary protection appears applicable to EDPs, unless their plight is considered to amount to inhumane treatment[113] or their life is threatened in the context of an armed conflict. Contrarily, EDPs might be eligible for temporary protection. This follows less from the possibility that states might engage in generalised human rights violations following an environmental event. More importantly, the list of envisaged persons is non-exhaustive. Although this list may be interpreted as establishing a priority over other categories like EDPs, they a not a priori excluded, because the determining element remains the discretional political decision of the Council. Therefore, EDPs may be granted temporary protection if there is the political will in a majority of EU Member states.

European state practice is inconclusive on this point, as the Temporary Protection Directive has never been applied in practice. However, the USA grants temporary protection to victims of environmental disasters, albeit under restrictive conditions. The state of origin must be unable to adequately handle the return of affected persons. Furthermore, the only eligible persons are those already present in the USA, which would exclude all EDPs seeking admission because of environmental disasters.

As far as complementary protection is concerned, state practice is even less promising. It has been underlined that although EU Member states were aware of environmental causes of forced migration, they deliberately excluded the issue from the Qualification Directive. Moreover, in the few cases where legislation explicitly provides protection from removal for persons displaced by natural disasters, the relevant provisions have never been applied in practice. In other states, broad human rights clauses or discretionary powers potentially allow the protection of disaster victims, but those provisions have been applied restrictively. For example, Denmark explicitly denied any legal status to victims of the Chernobyl disaster.

In other instances, responses remained pragmatic and discretionary. In the case of the2004 Tsunami, Canada accelerated family reunifications for immigrants whose family members were affected by the disaster, without elaborating a general admission scheme. Moreover, New Zealand accepts certain quotas of pacific islanders, but only workers and under restrictive

conditions.

4. Are the regimes providing protection abroad adequate for the case of EDPs?

So far, it has been shown that EDPs are excluded from the scope of the different legal regimes providing protection abroad, with the possible exception of the EU Temporary Protection Directive. The present section will highlight further issues that would impede EDPs to receive protection under those regimes, even if their scope was enlarged to include EDPs. Most of those issues could be avoided under a temporary protection regime.

4.1 Availability of internal protection

The first issue derives from the generally accepted fact that refugee law provides only a surrogate to national protection. State obligations vis-à-vis refugees only arise if they lack protection by their state of origin. In the case of EDPs, an internal protection alternative (IPA) would become even more relevant because the state is normally not the immediate origin of the harm. Consequently, the applicant would not benefit from any presumption against an IPA and would have to prove that meaningful protection is unavailable in another part of the country. He will not succeed if it is true that states are generally willing to protect their population in cases of displacement by natural disasters.

Similar considerations apply to non-refoulement under IHR and complementary protection regimes. This is evident from CAT jurisprudence examining whether internal protection is available. Similarly, the ECtHR found it necessary to assess whether an internal flight option can offer a “reliable guarantee”against the risk of ill-treatment. The IPA is also relevant in complementary protection regimes, such as the EU Qualification Directive and national legislation.

The common underlying rationale is that the state of origin bears the primary responsibility to protect. Only where national Protection is unavailable, the International Community comes into play. Therefore, even if those regimes included EDPs, the IPA would prevent them from successfully claiming protection abroad in most cases. By contrast, temporary protection regimes do not normally require the absence of an IPA, although this element might be considered in the political process leading to the protection decision.

4.2 Individualistic approach to status determination

Another difficulty derives from the consideration that environmental events will most likely trigger mass movements. Arguably, this is incompatible with the individualised determination of refugee status or other complementary protection based on IHR. In fact, national authorities decide on an individual basis whether to grant protection and human rights jurisdictions require an individual risk of ill-treatment. Therefore, two important problems would arise if EDPs were covered by those regimes. Firstly, a judicial reasoning that makes protection dependent on the fact that the individual position is worse than the rest of the group, would exclude EDPs affected in the same indiscriminate way by environmental harm. However, in determining refugee status, state practice has moved away from requiring such a singling out criterion.

Secondly, the sheer case load could overburden status determination procedures,although not every mass-exodus necessarily leads to a mass-influx. In cases of mass-influxes of refugees, group determinations have been carried out. Also the extended regional refugee definitions respond to large-scale group situations. On the other hand, there is a tendency to deal with cases of mass-influx outside the framework of refugee law. Generally, states have preferred to address mass-influxes through temporary protection schemes. Such schemes do not only avoid individualised decision-making, but they also provide refuge until durable solutions are found,while avoiding the overburdening of domestic status determination procedures. Therefore, temporary protection appears as the most appropriate solution to collective flight from indiscriminate harm.

4.3 Feasibility

More fundamental is the question whether an extension of non-refoulement and other rights to victims of environmental events is feasible in the light of state practice. As outlined above, the state practice towards "ordinary" refugees is already restrictive. An extension of the convention grounds would provide an additional channel for inflows of aliens, increase the perceived threats and add to the actual crisis of refugee law. The economic and social burden for receiving countries would be especially high if scholars are correct in predictinglarge numbers of EDPs.As Hailbronner points out, "receiving states are not prepared to accept a

general duty to admit an indefinable number of persons", just because their states are unable to guarantee their economic and social rights. Also the UNHCR has noted the general reluctance of states "to undertake internationally binding legal obligations towards refugees beyond those that they have already assumed."

The exclusion of EDPs from complementary protection regimes confirms this general trend. However, in the case of temporary protection, states appear more willing to accept broadened definitions. In fact, a protection decision for a determinate group and for a determinate period would avoid an unpredictable inflow and indefinite legal commitments.

4.4 Internal dimension of environmental displacement

Finally, the obligation of non-refoulement or any other rights under refugee law and IHR only apply to persons who left their country of originand entered the jurisdiction of the protecting state. However, it is generally accepted that persons fleeing an environmental event are more likely to be displaced within their own country. Therefore, an extension of regimes providing protection abroad would not benefit the main part of affected persons. Consequently, it needs to be assessed whether existing law and practice concerning IDPs also apply to EDPs and whether adequate protection is provided.

5. Protection of Internally Displaced Persons

This section will outline the characteristics and sources of protection for IDPs. After that, it will assess whether EDPs can be considered as IDPs and which actors are responsible for their protection.

The distinctive feature of IDPs is that they remain within the realm of national sovereignty. This has two important implications. Firstly, they do not lack legal protection in the same way as refugees. Instead, they remain entitled to their rights as citizens and under IHR. Secondly, other states and international organisations must respect the principle of domestic jurisdiction, even where states are unable or unwilling to protect their own population. Possible solutions to this dilemma have been sought in the concepts of responsibility to protect and sovereignty as responsibility. For example, it has been argued that under

certain circumstances states are obliged to accept international assistance and protection for IDPs with the parallel duty of the International Community to offer such services. However, this debate is far from settled and it has proven more feasible to render accessible and clarify the different existing rules relevant for IDPs in order to facilitate their application. This process of codification and consolidation led to the adoption of the legally non-binding Guiding Principles on Internal Displacement.

This soft-law document has received considerable support among states and international organisations. Furthermore, African states have been willing to accept legally binding obligations on the regional level. In 2006, the International Conference on the Great Lakes Region has adopted a Protocol on IDPs and the AU is currently drafting a Convention on IDPs. Both instruments are based on the Guiding Principlesand oblige states parties to adopt and implement them. This includes the incorporation of the IDP definition into domestic legislation and the creation of a legal framework for the protection and assistance for IDPs.

It is important to underline that an IDP definition cannot confer any special legal status and necessarily remains descriptive. In fact, if the treatment afforded was dependent on a status determination procedure similar to refugee law, this would put into question rights already enjoyed. However, the definition has real effects in practice, as activities in favour of IDPs by different actors will depend on whether these actors include EDPs within their mandate. Therefore, it is necessary to consider whether EDPs are covered by the IDP definition.

5.1 EDPs as IDPs?

The Guiding Principles define IDPs broadly, in a way that includes EDPs, who may be considered as persons "forced or obliged to flee or to leave (…) as a result of or in order to avoid the effects of (…) natural or human-made disaster". The category of disasters is considered to include not only sudden events but also environmental degradation and famine and would therefore cover most EDPs. This interpretation is confirmed by the wording "flee or to leave" in the definition of the Principles that suggests that both sudden and gradual onset events are envisaged. Furthermore, the words "in order to avoid" were introduced in order to include even displacement in anticipation of future harm. Also the regional approaches confirm the inclusion of EDPs fleeing slow-onset degradation. In fact, the

Great Lakes Protocol recognises not only "disasters" but also natural "causes" for displacement. Similarly, the AU Draft envisages other "factors" and "any phenomenon of comparable gravity".

There has been less international support for an alternative definition that includes disaster victims only "whenever the responsible State or de facto authority fails, for reasons that violate fundamental human rights, to protect and assist those victims". This definition is based on the understanding that economic and social problems are less worthy of protection, and seems to require the existence of human rights violations as a necessary precondition. Similarly, some scholars would exclude disaster victims, as the causes for their displacement are different.Contrarily, pursuant to a rights-based approach, not the causes for displacement but its human rights implications are the crucial element. Rather than requiring the existence, the Guiding Principles aim at the prevention of human rights violations, to which disaster victims are especially vulnerable.

However, the central element of any IDP definition remains the involuntary nature of movement. Economic migration is excluded, even in cases of extreme poverty.Arguably, such cases are better addressed through development assistance.Therefore, it would be difficult to include persons who do not flee an obvious disaster but merely because of deteriorated economic conditions due to gradual environmental degradation. Even where the broad definition is accepted, effective protection of EDPs will depend on how narrow actors of protection interpret natural disasters.

5.2 Actors of protection

The question whether EDPs receive assistance and protection as IDPs, depends on those who provide these services. Generally, such activities are the primary responsibility of the state of origin, but also the International Community and other relevant actors may become involved.

5.2.1 States of origin

Although states may refuse to consent to the protection activities of international actors, they generally appear willing to accept international assistance to protect IDPs in cases of

disasters.[203] In fact, states have agreed to establish competent organs and channels for cooperation with international and regional actors. Furthermore, an increasing number of states introduce or revise national legislation to incorporate the Guiding Principles. However, at least in one domestic IDP definition, the reference to victims of natural disasters was omitted. Moreover, some states have been reluctant to consider disaster victims as IDPs and to adequately protect their human rights in practice.Therefore, it must be assessed whether international actors can remediate lacking protection for EDPs by states of origin.

5.2.2International actors

Traditionally, UNHCR and ICRC carry out the most important protection activities. Other relevant actors include different UN agencies, IOM and NGOs. While the mandate of UNHRC has been extended to include IDPs, ICRC requires the existence of an armed conflict and concentrates on victims generally, rather than on specific categories like IDPs. Furthermore, these institutions are not always present and many IGOs and NGOs have been reluctant to engage in protection, due to security concerns and lacking expertise and experience. This protection gap is even larger in the case of EDPs, because UNHCR has raditionally limited its activities to IDPs fleeing armed conflicts, generalised violence and human rights abuses.

However, since 1997 the UN has promoted a process of coordination and enhancement of the international response to internal displacement within the framework of the UN humanitarian response system. After a new agency for IDPs was opposed for the risk of duplicating competences, UNHCR has been assigned the leadership in IDP protection within the current "cluster approach".

This approach is relevant for EDPs who are displaced by natural disasters. In this case, the area of camp coordination is led by IOM and emergency shelter is coordinated by IFRC. The protection of disaster victims is to be carried out either by UNHCR, UNICEF or OHCHR after case-by-case consultations establishing which agency will assume the leadership. This is a noteworthy development, given UNHCR's restrictive application of its IDP mandate.

However, UNHCR is keen to avoid any prolonged involvement in situations of disaster displacement.

As a matter of practice, UNICEF has led the protection cluster in most cases of natural disasters but its narrow focus on children has impeded an effective protection of all disaster victims. Furthermore, protection was also undermined by tensions between different agencies and their individual priorities.

Despite these problems, the cluster approach has enhanced the response to natural disasters.[222] This new approach shows the willingness of international actors to enhance IDP protection and to extend it to EDPs. It is a first step in addressing the cumbersome and weak institutional framework and its insufficient performance in practice.

To sum up, protection of IDPs is about promoting compliance with existing international law and assisting states in meeting their obligations towards the population, rather than about providing surrogate legal protection. In order to effectively protect EDPs as IDPs, a number of obstacles must be overcome. Firstly, as long as the IDP definition is non-binding, states remain free to exclude disaster victims from any specific measures in favour of IDPs. Secondly, it may prove difficult to distinguish those EDPs, who are not disaster victims from internal economic migrants. Thirdly, the assistance to disaster victims in practice suffers from unwillingness of states and insufficient international response.

6. Conclusions on existing protection

This chapter has made clear that under existing law and practice, EDPs are generally excluded from protection abroad, while their potential protection as IDPs is far from effective. It has revealed key challenges that must be considered by anyone who proposes new international rules for EDPs.

Firstly, protection abroad is completely different from protection internally, both in terms of the individual legal entitlements and the legal means of the International Community. Nevertheless, both dimensions build upon the general principle that the state of origin has the primary responsibility to protect its population. If it is true that environmental displacement will take place to an important extent within national borders, then the current framework of IDP protection must not be discarded. On the contrary, it would be useful to strengthen existing rules and institutions, as they already explicitly address disaster displacement.

Secondly, the legal regimes providing an individual right to protection abroad share features that render their application to the case of EDPs particularly difficult. Applicants would have to prove that no IPA is available because their country is unwilling or unable to protect them. Furthermore, the individualised decision-making procedures could prove inadequate or unworkable in situations of mass-movements, like those predicted for EDPs. By contrast, these difficulties are absent in a regime providing temporary protection triggered by a discretionary decision in specific situations of mass-influx.

Thirdly, there is a rather restrictive trend in state practice as far as protection abroad is concerned. By contrast, the practice of states and the International Community indicates increasing attention on the special needs of disaster IDPs and on enhancing their protection, at least in theory.

CHAPTER II

Evaluation of proposed legal solutions to environmental displacement

The present chapter will critically discuss different proposals for an international regime on EDPs against the background of the previous chapter. After considering how enhancing IDP protection could benefit EDPs, it will be explained why extending the Refugee definition would be legally unsound. Among other alternatives to enhance protection abroad, a multilateral temporary protection regime appears as the most appropriate solution.

1. Enhancing IDP protection

In trying to overcome the obstacle of sovereignty and in alternative to the current soft-law approach on IDPs, French scholars have been particularly inventive. The most radical approach is the doctrine of ecological intervention, according to which the trans-border nature of environmental disasters or pollution would justify disregarding the sovereignty of a state, who is unable or unwilling to deal with the consequences. More moderated scholars have attempted to combine the international principles of humanitarian assistance in disaster situations with those of international environmental law. The ensuing“ecological

assistance" is conceived as a duty of the International Community and a right of victims of environmental harm. In this regard, it has even been considered to create a UN task force of "green helmets", in order to provide assistance and protection within countries affected by environmental disasters.

However, the principle of humanitarian intervention remains highly debated in doctrineand not even the principles of humanitarian assistance are firmly established: neither as an individual right to receive, nor an international duty to provide, nor a state obligation to accept international protection and assistance. Therefore, although such proposals are theoretically

capable of producing the best results, they are unlikely to be applied in practice in a foreseeable future.

More fundamentally, such legal initiatives in favour of internal EDPs would be incoherent if they did not apply also to other IDPs. The argument that specific rules for specific categories may be justified by their special needs and vulnerabilities cannot be valid in this case, because EDPs are a subgroup of IDPs and share the same needs and vulnerability.Therefore, the problem of internal EDPs cannot be addressed independently from the efforts to strengthen the current IDP framework.

A useful solution would consist in supplementing the current soft-law approach with a specific legal regime on IDPs. Such an instrument would have the same advantages and shortcomings as other human rights treaties for especially vulnerable categories, like CEDAW or CRC. A binding IDP definition would render it more difficult for states to justify the exclusion of disaster victims from measures in favour of its IDPs. Furthermore, it would give rise to jurisprudence that could help to clarify the notion of disaster victims and distinguish EDPs from internal economic migrants. A specific treaty would also be important in terms of reparations and redress, as well as a basis for a more effective institutional response.

2. Extending the Refugee Definition

As far as the cross-border dimension is concerned, an extension of the conventional refugee definition is only apparently the most obvious solution. Some authors argued that intentional pollution could be considered as "environmental persecution", and that victims of

environmental degradation have a "well founded fear of starvation or drowning". However, the legal implications of these proposed concepts were not recognised. A more differentiated

analysis lead other scholars to suggest the extension of the social group ground to victims of environmental degradation or the introduction of an entirely new ground of persecution by a modification of the environment. However, this would still require considering persecution as a sufficiently severe violation of human rights connected to environmental harm. Furthermore, the harm would still have to be attributed to an agent of persecution: it would be somewhat artificial to consider environmental events as such as persecution.

These considerations have been taken into consideration by scholars considering an extension of the Convention definition. Thus, the authors of one of the most recent proposals ecognisethat environmental events do not as such constitute persecution. Instead, they propose a definition intended to cover both natural and human-made causes, based on a "fear of destruction, harm, endangerment or loss of life due to the environmental impact, or fear of the same from entities that are responsible for the displacement." However, even if persons fleeing environmental harm were included in the framework of the GC51, this would entail undesirable effects.

Firstly, it would create an additional category of refugees whose status would depend on entirely different criteria. This could threaten the normative coherence and integrity of the Convention. Secondly, as outlined above, the requirement of exile and the IPA would prevent the applicability of the extended notion in most cases. However, attempts to circumvent these problems would give rise to considerable incoherencies. To include IDPs in the convention definition would impose upon states to attribute the refugee-specific set of rights to its own citizens. As these rights are inferior to the rights that citizens already possess, an extended definition would not only be superfluous but even dangerous, because it could provide a pretext for states to deny victims of environmental events their rights. Finally, the mass character of environmentally induced displacement would not only require a shift from individualised assessment of applications to group-determinations, but could also overburden domestic procedures.

These considerations show that an extension of the refugee definition is not capable of producing the desired effects. In addition, it is unlikely to prove effective, because it seems infeasible in the light of restrictive state practice. Moreover, it would increase the number of persons under the mandate of UNHCR and other relevant institutions and could weaken relevant assistance and protection activities. Consequently, most scholars oppose an extension of the Convention definition.

3.Innovating Protection Abroad

Alternative proposals on how EDPs could receive protection abroad vary considerably. They are based on different regimes including environmental and human rights law.

3.1 Environmental Law

One approach uses environmental law responsibilities as a source of legal obligations to protect. If it is possible to consider environmental displacement as a consequence of human action, like climate change or pollution, this could entail state responsibility under international environmental law. Consequently, it is argued that those responsible for the causes of displacement should shoulder the consequences, e.g. by admitting quotas of EDPs proportionate to their emission of greenhouse gases.

However, it is doubtful whether this conflation of responsibility for displacement and responsibility to protect would provide a coherent solution. Firstly, protection would depend on whetherstates acknowledge their role in environmental degradation. Secondly, the protection by other states not responsible for pollution risks being neglected. Furthermore, it could undermine the general principle that the state of origin has the primary responsibility to protect its population. Therefore, it appears more coherent to use the responsibility for environmental displacement to increase international aid to states of origin and protection activities for EDPs. In the light of globally restrictive immigration policies, states appear more likely to use environmental law responsibilities to distribute the financial burden, rather than to distribute migratory flows.

In another approach, environmental displacement is treated like any other potential harm to another state deriving from environmental damage. Accordingly, states would have the duty to notify each other of environmental migrations and the duty to contain the "problem before it grew to threaten other states". In order to address trans-border displacement, neighbouring states would negotiate contingency plans, stipulating non-refoulement obligations, rights of displaced persons and setting up sanitation and living facilities. However, this approach treats the victims as part of the problem and does not aim at effectively addressing their vulnerabilities. On the contrary, negotiating the rights of and aid to displaced persons bilaterally, presents the risk of fragmentation and divergent standards.

3.2 Human Rights Law

A more coherent approach is based upon international human rights law. One solution could consist in a new treaty addressing both protection needs and root causes, modelled on the CAT, including a treaty body that would oversee compliance.Under this system, it would be prohibited to return individuals to a risk of environmental harm, similar to the non-refoulement obligation under Article 3 CAT. However, this proposal raises similar difficulties as an extension of the refugee definition. Firstly, an examination of every individual case would be required. This does not appear as the most effective means to address the indiscriminate nature of environmental harm and could prove impracticable in the case of large-scale influxes. This argument has not been considered, despite references to estimates of increasing numbers of EDPs and the large-scale nature of environmental displacements. Therefore, strong arguments suggest that group-based solutions are more appropriate in the case of environmental displacement. Secondly, in most cases the risk of environmental harm will not extend to the whole territory of the state of origin and an IPA would be available where those states are willing and able to protect EDPs from such harm. This could preclude the applicability of the new regime to most applicants.

3.3 Temporary Protection

These difficulties could be avoided by a multilateral convention on temporary protection for EDPs, conceived as an admissions scheme similar to the EU Temporary Protection Directive. According to this proposal, specific groups of EDPs would be identified for protection by a multilateral organ, composed of affected states and relevant UN agencies.[278] States Parties would be obliged to grant temporary asylum to protected persons until the creation of conditions for a safe return. In fact, this protection status is not intended to create the substitute citizenship rights of refugee status.Rather, it focuses on the provision of material aid and humane treatment until the effective protection by the home state is re-established.

This centralised protection decision would avoid the overburdening of individual status determination procedures. Moreover, rather than investigating the existence of an IPA in every individual case, decision-makers could take into consideration the general inability of the

state of origin to protect the affected group.

Furthermore, states are becoming aware of the need to manage the increasing pressures of environmentally-induced migration.[282] The present proposal would be attractive for states as it strikes a balance between addressing humanitarian needs and avoiding unpredictable inflows and indefinite legal commitments. In fact, any protection decision would give rise to a foreseeable and limited commitment. Therefore, it would be an advantage that no general non-refoulement obligation is created, which could be judicially enforced by anyone.

Another advantage of a centralised protection decision is that no strict legal definition needs to be established. This would allow the International Community to respond in a flexible way to different forms of environmental displacement. At the same time, the multilateral character and the clear standards of this protection regime would avoid the risk of fragmentation that could arise if ad hoc solutions were sought on the bilateral level.Moreover, the organ to be created could act as a forum for the negotiation of an equitable

burden-sharing. For example, a protection decision could be accompanied by financial commitments taking into account the abovementioned environmental responsibilities. Furthermore, in cases of permanent environmental destruction, durable solutions would have to be negotiated on a case-by-case basis according to each specific situation. For instance, in the case of submerged small island states, the only viable alternative would be resettlement abroad.

Although the proposal has a great potential, it also presents certain disadvantages that must be addressed. Firstly, temporary protection could dilute the protection for conventional refugees. However, this fear seems unfounded in the present case, as the envisaged regime is no alternative to the GC51. Contrarily to the case of victims of armed conflict under temporary protection, it appears far less likely that conventional refugees will be among EDPs.

Secondly, the proposal to extend the envisaged regime also to IDPs is questionable. As outlined above, a special legal status for internal EDPs is undesirable. Even if a specific set of rights conflicting with citizenship rights was avoided, it would still privilege disaster victims over other categories of IDPs.

The most important challenge would consist in avoiding package deals and deadlocks within

the decision-making organ, which could prevent the system from being coherently and effectively applied in practice. In this regard, crucial elements are membership and votingprocedures. States are unlikely to give up sovereign control over immigration issuesby

accepting protection decisions of a body in which they are not fully representedor by agreeing upon majority voting. However, the intergovernmental experience within the EU provides guidance on how to make unanimous decision-making work. For instance, with a constructive abstention procedure,single states could avoid to be bound by the obligation to grant temporary asylum without preventing the protection decision from being adopted.

CONCLUSION

Two main conclusions can be drawn from the examination of proposed solutions to the problem of EDPs in the light of existing law. Firstly, the internal dimension of environmental displacement should be addressed separately from the external dimension, in order to avoid conflicts with citizenship rights and discrimination against other IDPs. A multilateral treaty similar to the existing regional initiatives could contribute to strengthening existing rules and institutions for IDPs. Secondly, not all regimes providing protection abroad appear equally suited for the case of EDPs. While several reasons militate against an extended refugee definition, even approaches based on environmental or human rights law are not unproblematic. However, a temporary protection regime appears as the most effective solution. Its legal features are best adapted to the case of EDPs and it seems to be the most attractive option for states. In the elaboration of such a regime, the EU norms on temporary protection could serve as a model and guidance could be found in the intergovernmental experience within the EU.

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