

International Law and Environmental Displacement: Towards a New Human Rights-Based Protection Paradigm

By Isabel Mota Borges (December 2015)

Thesis Abstract

Every year, millions of people are forced to leave their homes and become displaced. They are cut off from their roots, communities, social ties, and support networks. Climate change and natural hazard related disasters are understood to play a crucial part in some of these events. While the causes of displacement are manifold and complex, this thesis explores the increasing concern over the extent to which those suffering from forced (or potential) cross-border displacement as a result of environmental change are protected under international law, in particular human rights law. Formally, they are not entitled to admission or to stay in a third state country. This has been identified as an international “legal protection gap” that displaces people and impacts upon their human rights. This creates a situation where people’s predicaments do not receive adequate government intervention.

Centred around a holistic understanding of protection from-during-after displacement (but concentrating only on the first and last phases of environmental displacement) the study seeks to provide adequate answers to two basic questions: 1) whether and to what extent existing international law protects cross-border environmental displacement? and 2) whether and how existing formalised regional complementary protection standards can interpretively solidify and (re)conceptualise protection for cross-border environmental displacement?

The study stresses that the plight of the environmentally displaced warrants a human approach to their vulnerability, conveying human rights as an integral part of their protection, recognising that environmentally displaced persons, here defined as EDPs, are plainly entitled to enjoy a wide range of civil, political, economic and social rights set out in international and regional human rights treaties and customary international law, whilst at the same time highlighting the corresponding (home and host) states’ obligations.

The analysis of the human rights paradigm enshrined (explicitly and implicitly) in international and regional treaties and interrelated operational frameworks, as well as being erected jurisprudentially, underlines that states have the obligation to take preventative action to respect, to avoid violating, and to take positive steps to fulfil human rights. The discussion outlines that the protection of the human person is not only an ex post facto obligation of states, but must be increasingly seen as an ex ante one. It requires a transformational change in government practices towards working in a proactive rather a reactive matter. Here labour migration - as a new status of protection - has a legitimate role to play for vulnerable communities in particular, when adapting to environmental change. As the fields of human rights and environment expand and intertwine, so do the legal cumulative effects of these frameworks, which highlight the prevention of, or protection from, cross-border environmental displacement as an important protection dimension of emerging customary nature.

Importantly, the human rights framework identifies the “minimum standards of treatment” that should be afforded to EDPs (i.e., identifying the rights violated or at risk and how states need to deal with risk and their obligation to deal with it). It falls short, however, in providing an effective



protection mechanism or status when someone crosses a border due to environmental factors. This is because the international legal protection regime has been traditionally geared, once displacement occurs, towards the narrow class of those fleeing political persecution under the 1951 Convention Related to the Status of Refugees. This present legal structure, while relevant as a point of comparison, and although it offers protection and status to those who cross the border due to environmental factors in certain circumstances (where environmental impacts may amount to persecution based on qualified grounds), is still largely inadequate. The Refugee Convention was created for a different purpose and, therefore, has limited application to engage host states in particular obligations. Nevertheless, the increased convergence of the law of protection of the human person at regional level has expanded protection beyond the remit of that conventional instrument into codified forms of subsidiary or complementary protection under the European Union legal framework.

The analysis suggests that the European Union's regionally orientated protection regime can help states to consolidate an evolving protection paradigm of proactive and reactive measures being erected at the international level for environmental cross-border displacement and narrow the identified legal protection gaps. In other words, it helps states to (re)conceptualise protection as a holistic and dynamic enterprise. The objective is to highlight protection - as a way of reflecting the international human rights obligations of states - by way of a process of consolidation of existing: proactive (ex ante) and reactive (ex post) protection measures. Ex ante protection encapsulates protection of EDPs from displacement i.e. as prevention. It looks at strategies to deal with the predicted effects of environmental change (e.g., circular labour migration through the Seasonal Workers Directive and/or Mobility Partnerships). Ex post protection deals with the effects of environmental change and the various modes of legal protection that are available and that can be adapted to protect EDPs once they cross an international border (e.g., temporary protection through the Temporary Protection Directive and subsidiary protection through the Qualification Directive). The study takes an optimistic stance by engaging in a dynamic and contextual legal interpretative analysis of the existing European Union regional protection framework and related jurisprudence, suggesting it as a potential model, which can - in the short term - be a stepping-stone to consolidate protection for EDPs, reinforce existing states' obligations, and even reorient the international protection regime if needs be.