

CREATING LEGAL PROTECTION

options for protecting people who move in the context of environmental change



UK CLIMATE CHANGE AND MIGRATION COALITION

The UK Climate Change and Migration Coalition exists to challenge the lack of long-term strategies to support and protect people at risk of displacement linked to environmental change. Our goal is to ensure a people centred policy response at the national and international level.

www.climatemigration.org.uk

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Climate Outreach and Information Network (COIN) is a charity established in 2004 motivated by a vision of a low carbon future that includes everyone. COIN started and now manages the UK Climate Change and Migration Coalition as part of its Defending Rights stream of work.

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COVER IMAGE

Two young members of a herder community in Tarialan, Uvs Province, Mongolia. Used with permission. Image copyright UN Photo / Eskinder Debebe

Introduction

When people move in the context of environmental change, it is frequently the case that the law will fail to protect their basic rights. These people often slip between the gaps in existing legal protection.

But how is this challenge to be addressed? Significant problems exist in creating new legal protection. Determining when someone's movement is linked to climate change is complex, while designing legislation to protect those people is even harder. New international agreements can take decades to negotiate, and our track record in reaching any agreement where climate change is concerned, is dismal.

However, a number of proposals for protecting people who move in the context of environmental change do exist. This briefing paper analyses some of the proposals and looks at the strengths and drawbacks of each.

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THE EXISTING PROTECTION FRAMEWORK FOR PEOPLE WHO MOVE. CAN IT PROTECT PEOPLE WHO MOVE IN THE CONTEXT OF ENVIRONMENTAL CHANGE?

Internal Displacement

The weight of expert opinion suggests that most climate related migration will be internal in nature. This is a trend already seen during environmental disasters when populations are forced to flee the location of the catastrophic event but subsequently return home when the situation stabilises. The rights of forcibly displaced migrants are regulated by the United Nations Guiding Principles on Internally Displaced Persons. However, these Principles are not legally binding upon states, and as a result they are often poorly implemented. Where people migrate due to slow-onset climatic changes, determining whether this migration is forced or voluntary is complex. If a family move due to a loss of livelihood occurring over several growing seasons leading them to extreme poverty, is their movement forced or voluntary? This distinction is relevant because, as the law currently stands, internal voluntary migration does not bring people under the legal protection of the Guiding Principles on Internal Displacement. Notwithstanding this, all migrants whether forced or voluntary, are protected by the international and domestic human rights obligations of the state. Further, human rights standards include the right to freedom of movement; a right which can only be limited by the state in specific circumstances.

The Refugee Convention

Although most displacement linked to climate change is currently projected to be internal in nature, a minority of migrants may cross international borders. International law recognises only a small group of cross-border migrants as people whom other countries have an obligation to protect: refugees and stateless persons. Thus the majority of people migrating in the context of environmental change fall into a legal void.

Article 1A of the UN 1951 Convention on the Status of Refugees defines a refugee as a person who has crossed an international border and can demonstrate a 'well-founded fear of persecution'. The persecution must be based on one of five reasons: race; religion; nationality; political opinion and social group. For the most part, people who move because of the impacts of environmental change cannot demonstrate they have a fear of persecution. The exception to this would be where the country of origin failed to provide humanitarian assistance in the face of climatic events because of a person's race, religion, nationality, political opinion or

membership of a particular social group and as a consequence exposed them to treatment that amounts to persecution.

The obligation upon the receiving state of a refugee is to allow a refugee the right to stay, thereby preventing return (refoulement) to the persecuting country of origin. This principle of non-refoulement forms the basis of a complementary strand of legal protection rooted in human rights law. Here, consideration is given as to whether returning a national to their country of origin raises an obligation for the host state to prevent a breach of fundamental human rights, currently understood as arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. Courts consider cases on an individual basis and interpret the meaning of inhuman or degrading treatment so that it does not apply to poverty, unemployment, or lack of resources or health care, except in the most exceptional cases. Currently, no courts have determined that return to the site of a disaster could evoke the principle of non-refoulement.

Statelessness

The international community also has an obligation to protect stateless persons. While the idea of a small island state being subsumed by the sea due to climate change creates a powerful narrative, however this scenario is unlikely in reality to create statelessness. The 1954 Convention on the Status of Stateless Persons defines a stateless person as someone without a nationality. There are only a small number of cases where climate change could result in the entire loss of a national territory. Even then a distinction remains between lack of territory and lack of nationality. Even with extensive or complete loss of territory a country is unlikely to cease existing as a legal entity. Its citizens would therefore not be stateless. It is therefore unlikely that the Convention on the Status of Stateless Persons could provide any kind of legal protection for people who might be forced to move in the context of climate change, now or in the future.

Migrating to find work

Another class of people who may cross international borders, albeit subject to immigration control, are migrant workers. The rights of migrant workers are protected in international law by the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990). However it only applies where the individual is in remunerated employment. Further, not many states have become parties to the convention, and therefore its applicability is very limited. Although migrating for work has the potential to offer a means of adapting to climate change, often states regulate carefully the number of migrant workers given entry. Further, migrant workers do not routinely qualify for permission to reside permanently in the host country.

Migrants who cross borders but who are not subject to international protection as refugees or stateless persons and who cannot be classified as migrant workers or be lawfully present under any alternative domestic immigration legislation, have very poor legal protection. They can be removed to the country they came from, usually to their country of origin, at any point. Some countries have the practice of detaining migrants, including migrant families and children, until they can be removed. They are unlikely to have permission to work, may be unable to obtain health care, education or any basic assistance. Although the host state is obliged to protect a few basic human rights, such as the prohibition on torture, these people exist in a legal vacuum.

OPTIONS FOR FILLING THE LEGAL PROTECTION GAP. A CRITICAL ANALYSIS OF EXISTING PROPOSALS.

It is clear that significant gaps in legal protection exist for many people migrating in the context of environmental change. Discussed below are the main proposals put forward to fill the protection gap.

Expanding the 1951 Refugee Convention

Some proponents have suggested that the Refugee Convention should be expanded to include those displaced by climate change. Whilst superficially this appears to be an easy solution (it is, after all, an international convention to which many states are already signatories), in reality there are a number of serious challenges to the proposition. Firstly, there is the challenge of unpicking the root cause of the migration and distinguishing between slow-onset degradation and rapid climate disaster. If untangling climate change from the other causes of someone's movement is difficult, then enforcing the updated convention could be impossible.

Secondly, it is possible that the Refugee Convention could be undermined. Receiving states generally interpret refugee law very narrowly in order to limit the number of people they are duty-bound to protect. Expanding the Refugee Convention would be more likely to encourage states to yet further reduce their responsibility to protect. The UN Refugee Agency considers that in the current political climate any attempt to expand the Refugee Convention could lead to a renegotiation resulting in the lowering of existing standards, which are themselves often interpreted in narrowest terms. Finally, extending the Refugee Convention would fail to provide protection for most of the people who might move. As the majority of movement linked to climate change is likely to be internal rather than cross border, an updated Refugee Convention would not protect most people likely to move.

A New Treaty

Developing an entirely new international treaty would be the most desirable of solutions in that it creates binding international law. However, creating a new treaty requires international consensus born from both agreement and certainty. The challenge of migration linked to environmental change, lies in the complexity of

agreeing fundamental elements of the potential treaty on issues around who can be protected and when. Determining who would and would not be covered by the treaty would be incredibly difficult. As we have seen unpicking the multiple causes of someone's movement is often hard. Singling out climate change as the sole, or even primary cause of someone's movement is often impossible. Therefore setting out who would be covered by the treaty would be immensely complex or even impossible.

Even if negotiated, a treaty would still have to be ratified by states; and if there had been any initial lack of consensus this could translate into a failure of states to ratify. The challenge of climate-induced migration comes from the difficulty of ascertaining when climate change is the root cause of migration. This leads to problems in defining who would be covered by any resulting legal protection. A new international treaty could end up privileging people whose movement is linked to climate change over other differently motivated migrations.

Negotiation would be difficult as there are incompatible interests between the potential countries of origin (which are predominantly less developed and poorer), and destination countries, who do not generally welcome migrants. For these reasons, agreeing soft law principles, as distinguished from binding international law, may be easier.

Expanding the Guiding Principles on Internal Displacement

To some extent, the Guiding Principles on Internal Displacement already provide some protection for people who move in the context of environmental change. Specifically, they provide protection for people who move due to disasters. The Guiding Principles apply to “persons or groups of persons who have been forced or obliged to flee or leave their homes or habitual places of residence, in particular as a result of or in order to avoid the effects of ... natural or human-made disasters.”

The Guidelines are, however silent on slower onset degradation and specifically exclude economic motivation such as escaping poverty. This does leave something of a gap in protection for those whose displacement is caused by a gradual deterioration of living conditions such as repeated flooding, or loss of livelihood through desertification of land. It is not at all clear that these migrants would benefit from the provisions contained within the Guidelines.

Also uncertain is the extent to which the Principles apply to resident citizens of a third country who become displaced there. Notwithstanding this, if the gaps in legal protection highlighted above were plugged the Principles could offer something of a template for standards of protection. The drawback is they are sometimes poorly implemented by states and as soft law, they are not legally binding. Further unlike refugees, no specific agency has overall responsibility to protect IDPs.

Adding a Protocol to the United Nations Framework Convention on Climate Change

Also mooted is the addition of a protocol on climate induced migration to the United Nations Framework Convention on Climate Change (UNFCCC). Discussions on climate induced displacement have always been part of the UNFCCC negotiations under the Ad Hoc Working Group on long-term Cooperative Action (AWG-LCA). The resultant Cancun Adaptation Framework asks member states to adopt ‘Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels’ (Section 14 (f)). This creates an opening to press for international discussions and action on climate change displacement. Even if the UNFCCC process is not the ultimate forum for the detailed enunciation of standards of protection it could help motivate states towards developing and adopting such standards.

Creating or amending regional conventions

As climate change will affect regions differently and in some cases quite significantly, there could be a more pressing need to respond to these challenges within regions. This could translate into a drive to fill the gaps in legal protection through regional instruments for migration linked to environmental change. There is a trend in law to create more and stronger regional treaties and treaty based bodies. For example the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) adopted in October 2009 explicitly mentions climate change. There are also regional instruments with broader definitions of refugees. Some regional instruments have judicial bodies (such as the African Court of Human Rights) which offer guidance to enable states to interpret their obligations.

Human Rights

People displaced internally are already protected by domestic human rights standards. So too are IDPs from third countries who are lawfully resident in the country in which they are displaced.

The courts have been applying the principle of non-refoulement (no return) where individuals cannot be returned to their country of origin where they face torture, inhuman or degrading treatment. Although currently the courts look at returnability through the prism of preventing torture and other ill-treatment, it could be possible to look more broadly at non-refoulement to include survival with or without a climate change dimension. The courts would still need to consider each case on its individual merits but it would no longer be a question of why someone moved, but rather whether they could be returned. The benefit of this would be that slow onset degradation could be catered for more easily. So too could all the drivers of migration that make people leave to enable their survival. This dynamic interpretation could provide a something of a solution. The drawbacks, however, are the potential time and costs of considering cases individually, with the discretion which inevitably is applied by states and courts leading to protracted legal processes, and discrepancies between different jurisdictions.

A Global Guiding Framework

The Global Guiding Framework suggested by Professor Jane McAdam, University of South Wales, is the development which would bring together relevant law derived from states' existing human rights obligations. Rather than requiring states to assume new obligations the framework would set out how current obligations should apply to climate change induced migration. This would be based upon binding principles of Refugee and Human Rights law, and would incorporate the complementary protection around non-refoulement. Over time the framework could promote such norms into domestic law, or inform, with the benefit of state practice, new multilateral instruments.

Returnability Test

One of the challenges defining climate induced migration is how to distinguish between forced and voluntary migration when environmental degradation may be slow-onset. This lack of clarity makes it difficult to determine who should be accorded the benefits of a protective regime. To decide if migration is voluntary could

require an analysis of the individual's circumstances pre-movement, an assessment of their vulnerability and an assessment of the causal link between climate change and their movement. Given the impossibility of this task, Walter Kalin (member of the UN Human Rights Committee and former Representative of the UN Secretary General on Internally Displaced Persons) suggests a 'returnability test' which would dispense with the need to make an (often unnecessary) distinction between forced and voluntary movement. The returnability of the person concerned should be considered on the basis of whether it is legally permissible, practically feasible and morally reasonable to insist they should be returned to his or her country of origin. If the answer to one of these questions is 'no', then the individuals concerned should be regarded as forcibly displaced person in need of protection and assistance in another state.

Linked to this Kalin proposes that people who have protection needs and who cannot be returned should be entitled (i) to enter countries of refuge, (ii) to stay there temporarily, i.e. as long as the obstacles to their return exist; (iii) to protection against refoulement as well as expulsion to other countries; and (iv) to stay permanently if after a prolonged period of time (some years) it becomes clear that return is unlikely to become an option again.

The Nansen Initiative

The Nansen initiative get its name from Fridtjof Nansen, the acclaimed Norwegian explorer and first High Commissioner for Refugees. In 2011 the Norwegian Government held a conference on Climate Change and Displacement of which the outcome was the agreement of a set of broad recommendations known as the Nansen Principles. In 2012 the Governments of Norway and Switzerland launched the Nansen Initiative, a state-owned consultation process which is seeking to build consensus on closing the gap in legal protection in the context of sudden and slow onset climate change and geophysical disasters.

The 3 year Initiative has started with a series of regional and sub-regional consultation meetings in regions particularly affected by actual, or expected, disaster-induced cross-border displacements including the South Pacific, Central America and the Horn of Africa. These consultations are bringing together various stakeholders, including civil society representatives, experts and organisations that deal with humanitarian emergencies, together with the governments of countries where people are displaced and countries of destination. The overall goal of the Nansen Initiative is to build a consensus on key principles and elements on

protecting persons displaced across borders through natural disasters. It is hoped that this consensus will set the agenda for future action at domestic, regional and international levels.

Multi-track Approach

From the commentary above, it is clear that the challenges of climate induced migration cannot be solved by any single initiative. Further, any response to this issue needs to commence long before migration is a reality. Whilst some migration will be as a result of a rapid onset disaster or, as is discussed later, is planned as part of an adaptation strategy, the principle should aim to enable people to stay in their home locality which itself offers safety and a sustainable means of livelihood. A multi-track approach for cross border movement of persons should consider the following: i) preventing displacement through disaster risk and vulnerability reduction and other adaptation measures; ii) a perspective that sees migration as a useful tool to assist some communities that have to adapt to the effects of climate change. Measures such as managed regular migration schemes, including immigration quota or targeted admission of migrants from particularly affected areas, would assist such adaptation efforts and, at the same time, reduce the risks of irregular migration. One way in which such a policy could be implemented is through bilateral or (sub-)regional agreements between countries with traditional migration flows. iii) providing temporary protection status for persons displaced to other countries and permanent admission in cases where return turns out to be impermissible, impossible or cannot be reasonably be expected over time; iv) resettlement/relocation for populations of low-lying small island states and other states losing substantial amounts of their territory.