

Seeking Legal Protection for Environmental Refugees

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Abstract

The purpose of this article is to examine the legal vacuum regarding the status of environmental refugees which are deprived of legal existence and thus lack protection in international law. By describing the negative impact of climate change on this category of population, the article used the qualitative method to bring adequate responses to raised questions regarding the merit of the term "environmental refugee", the potential challenges it evokes, and the proposed solutions to address them. This article concluded that environmental refugee status has no legal existence, hence, public international law must build truly protective legal instruments for by adopting appropriate relevant conventions. The overview we have carried out showed that it will be more appropriate to use the term "environmentally displaced persons" instead of environmental refugee.

Keywords: Environmental refugees, displaced persons, legal protection, international law, Geneva Convention

Introduction

The continuous and excessive emissions of greenhouse gases produced mainly by industrialized nations, are - with scientific certainty- at the origin of floods, dryness, hurricanes, sea level rise, extreme temperature variations and seasonal unpredictability. All these factors with their devastating effects lead to poor harvests, the disappearance of islands, the destruction of homes, water scarcity and growing health crises that affect the rights to life, security, food, water, health, shelter, culture of millions of people forcing them to move inside their countries or flee to seek refuge beyond their boundaries (Bloch, 2018).

As courts may not be able to bring justice to such violations of rights, human rights principles must be at the heart of international climate change policymaking. The irreversible damages of these greenhouse emissions is threatening the existence of populations forcing them to flee their countries to become environmental refugees (Deschamps, 2021). In a context of persistent climate skepticism and anti-immigration sentiment, the overlapping of climate change and migration policies is fraught with multiple tensions. As global

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warming is caused by human activities, to protect these people, law must act as a savior and a weapon to rescue the environment (Bloch, 2018).

To identify the role that international law in this regard, we should first understand the term environmental refugees. An expert at the United Nations Environment Program (UNEP) named El-Hinnawi was at the origin of this notion and its definition: They are “*persons forced to leave their place of life, temporarily or permanently, because of a degradation of their environment, whether of human or natural origin, which seriously disrupts their living environment and/or seriously imbalances their quality of life*” (Elhadji, 2021).

In this paper, we will try to understand whether the current legal framework attributes protection for environmental refugees and identify the obstacles that international law faces in this regard. We will adopt a legal analysis of the different initiatives and proposals by governments, scholars, regional organizations, and domestic tribunals to address the crisis of environmental refugees.

Research Objectives

- This research seeks to explore and understand the international law responses regarding the urgent need to adopt a legal status for environmental refugees.
- It sheds light on the significant gaps of international law to meet the latest global challenges. In fact, the 1951 Convention alone cannot address the plight of environmental refugees. First, because it ensures the protection of people fleeing because their States no longer protect them or because they are persecuted by these same States, and second, because climate change issues did not exist as a threat when the 1951 Convention and 1967 Protocol have been signed. As for the 1949 Geneva Conventions and their additional protocols, they exclude environmental refugees from their scope as they are only applicable to armed conflicts.
- This research will analyze the different initiatives and proposals by scholars, regional organizations, and domestic tribunals to address the shortcomings of international law in this area.
- It will explore several approaches to improve the international protection and the possibility of granting environmentally displaced persons a legal status.

Literature Review

In the literature, I found many appellations for designating people who must migrate for environmental reasons. However, the issue of terminology is of utmost importance as it allows for a uniform legal strategy to protect these individuals (Martinet, 2020).

As a matter of fact, terms such as “environmental refugee” and “climate migrant” have been used in contexts that could accidentally give fuel to xenophobia and racism (Wisner, 2008). Some scholars even use the term ‘environmental racism’ to denounce the ethical dimension of environmental inequalities (Figuerora & Mills, 2005). Those who are in favor of the alternative expression ‘ecological displaced’, argue that it may offer more inclusive possibilities of talking about why and how people are displaced within and across borders beyond the heavy burdens of the racialized stigma attached to the notion of the climate refugee (Hiraide, 2023). It is also the case of some UK researchers who think that environmentalism contains the sediments of colonialism, and white nationalism, as much as it contains the sediments of liberatory projects (Tilly et al., 2023).

Some jurists argue that the notion of “environmental refugees” is broader than that of climate refugees (Elhadje, 2021). While political scientists and environmental policy scholars prefer to use the term ‘climate refugee’ arguing it has a strong moral connotation and gives the problem of legitimacy and urgency (Biermann & Boas, 2010). If climate cannot currently be cited as enough reason for seeking asylum or refugee status (Appap & Harju, 2023), some international organizations such as the European Union (EU) have adopted strategies on adaptation to climate change, like granting some compensation to victims of climate change disasters in the EU (European Parliament, 2023).

Others refer to the term ‘refugee’ as a ‘legal term of art’ confined to the definition by international law, and do not consider environmentally displaced persons as refugees (McAdam, 2012). As for Cecelia Tacoli, she rejects the term ‘environmental refugees’ assuming there is a direct causal link between environmental change and migration (Tacoli, 2009). While Subramanian and Urpelainen choose the term ‘environmentally displaced persons’ to not confuse their rights with conventional refugees (Subramanian & Urpelainen, 2013). Indeed, the term ‘environmentally displaced persons’ allows for considerations of climate change, human agency, and governance, when it comes to analyze the multicausal nature of environmental displacement (Jayawardhan, 2017). As a matter of fact, those people are forcibly displaced at least partly because of a natural disaster” (Kolmannskog, 2012) and could be considered “forced climate migrants” (Brown, 2008).

Methodology and Theoretical Framework

This research seeks to explore and understand the international law responses regarding the urgent need to adopt a legal status for environmental refugees. It is empirical legal research that involves critical thinking skills that assess related facts and information by adopting a qualitative legal approach that involves taking information about cases, courts, and international conventions and then analyzing them.

This qualitative approach is used as an inductive method to assess pertinent and structured legal documents concerning the subject matter, subjecting them to analysis and evaluation to draw conclusions that enhance the research's legal perspective. Moreover, this method adopted through content analysis of the research question helped draw a clear picture of the shortcomings of the legal framework regarding the definition of environmental refugee. In essence, the application of a multifaceted theoretical framework enriches the understanding of the complexities inherent to this new category of undefined and misidentified refugees that frightens welcoming States. In this sense, the terminological issue is of paramount importance since it makes it possible to adopt a unified legal strategy aimed at the protection of these people.

While the whole doctrine uses the term "refugee" to refer to environmental displacement (Bétaille, 2010), the International Panel on Climate Change Scientists (IPCC) prefers the term 'climate refugees' because this nomination reflects the advances of international awareness, under the very effective impetus of the climate community (Decrop, 2008). Unlike them, the United Nations High Commissioner for Refugees (UNHCR), adopted the term *environmentally displaced persons* (Jayawardhan, 2017), and we will be using it in this paper to refer to environmental refugees.

In the next section, we will identify and discuss gaps and obstacles in international law regarding the establishment of environmental refugee status. Will international law be able to fill this legal vacuum and the lack of political will for their protection, and give hope to the thousands of people whose fundamental rights are affected by climate change daily?

Gaps of International Law

It is often argued that "environmental refugees" and "climate displaced" are not protected by international humanitarian and human rights law, which would make their status more precarious because the concept of environmental refugees is not legally defined by international law (Elhadje, 2021). Today, the legal framework governing their protection does not exist, leaving many individuals unable to migrate decently in the event of a natural disaster, or

progressive degradation of their initial environment. The failure of international law to grant refugee status to environmentally displaced persons therefore underlines the need for more specific innovative legal mechanisms (Moullec, Martinet, 2023).

From a human rights perspective, domestic law as well as international law should ensure the protection of groups of individuals considered more vulnerable to climate change (Agostino & Lizarde, 2012). Nevertheless, international law and its branches lack specific protection for climate refugees. Whereas international humanitarian law is directed only to “victims of armed conflicts and does not apply to victims of ecological disasters (Belanger, 2002). The 1951 Geneva Convention on the Status of Refugees - the essence of international human rights in this regard (1951) - is often inapplicable. Indeed, this Convention ensures the protection of people fleeing because their States no longer protect them or because they are persecuted by these same States. Nevertheless, the universal system of human rights remains a viable option given that they are used over any circumstance of quality of the migrant, and therefore applies to this situation in the form of additional protection (Astroza, 2024). Thus, cases that have been brought before national courts on climate migration in New Zealand Australia, and other countries are based on violations of the fundamental rights of these migrants (Astroza, 2024).

International humanitarian law, in particular the 1949 Geneva Conventions and their additional protocols, exclude environmental refugees from their scope. These conventions are applicable to armed conflicts, except in the case of a combination of circumstances in which environmental refugees or environmental displaced persons are targeted, in an area where there are military operations relating to the conflict (Elhadje, 2021).

The 1951 Convention, it cannot address the plight of environmental refugees. First, because its purpose is to address a specific problem, and second, because climate change issues did not exist as a threat when the 1951 Convention and 1967 Protocol have been signed.

As for international environmental law, there is also a lack of legal status for these persons in international conventions and treaties. Indeed, at the time of the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, the focus was on the mitigation and adverse effects of global warming. Neither the Convention nor its Kyoto Protocol adopted in 1997 to strengthen global greenhouse gas emissions obligations addressed climate-related human mobility (Morel & Moor, 2012). There are evident gaps in international environmental law in this area. While the United Nations has the Food & Agriculture Organization (FAO) and the Commission on Sustainable

Development, it does not have a specialized agency for the environment. Certainly, there is the United Nations Environment Program (UNEP), but it remains a program that does not have enough resources. In addition, these instruments lack the dispute settlement tools and means to stop environmental violations as is the case with the World Trade Organization (Al Banna, 2016). All this explains the passivity and the real shortcomings of this branch of international law on protection against the negative effects of climate warming (Lepage, 2008).

For Monique Chemillier-Gendreau, public international law currently suffers from significant gaps and weaknesses in meeting the latest global challenges. The reason is that its contractual nature poses serious limits to the recognition of rights for the 'environmental refugee' and more generally for environmental protection (Chemillier-Gendreau, 2008). Moreover, international law is based on two main principles: respect for State sovereignty and the principle of non-interference in domestic affairs. To ensure effective protection for environmental refugees, these two principles will have to be limited. Because international protection should not have to be specific to people fleeing from their home State, internally displaced persons should receive international protection or assistance during ecological disasters (Bagshaw & Paul, 2004). Thus, even if the notion of "internally displaced persons" is undoubtedly useful to guarantee protection to environmental refugees, it currently lacks recognition in positive international law.

For Christel Cournil, faced with the shortcomings of international law in this area, apprehending environmental refugees will require a change in our legal achievements. Only a truly innovative and creative approach will allow the international community to find effective solutions to the global crises that threaten our planet especially the issue of environmental refugees (Cournil, 2006). Genvieve Decrop stresses the difficulty in granting environmental refugee status. She argues that if we grant this status to anyone from the areas identified by the IPCC experts, the environmental protection would concern between 150 and 200 million people by 2050 (Decrop, 2008).

Current migration policies represent another obstacle, as they reflect a growing rejection of immigrants by rich developed countries. If these countries slammed behind their borders, the phenomenon also began to affect developing ones, as indicated by the anti-foreigner riots in South Africa (Decrop, 2008).

Solutions

This section will analyze the different initiatives and proposals by scholars, regional organizations, and domestic tribunals to address the crisis of environmental refugees.

French scholars have passed the hypothesis of environmental displacement through the screening of existing legal protections in highlighting the international protective status of ecological refugees (Chemillier-Gendreau, 2006). In 2008, the University of Limoges submitted a draft Convention on the International Status of Environmentally Displaced Persons (Bétaille, 2010). The proposal included the recognition of a legal status for these people as well as the creation of new dedicated institutions, such as a Global Agency for Environmental Development.

In 2009 in the United States, David Hodgkinson, a chief lecturer from Columbus School of Law also formulated a Convention for 'Persons Displaced by Climate Change'. It aimed to adopt long-term resettlement measures and assistance based on State responsibility for greenhouse gas emissions. In addition to adaptation and mitigation measures implemented by host States with international financial support, it provides for the establishment of an assistance fund, and regular scientific studies on individuals at risk of climate change (Moullec & Martinet, 2023). This proposal also establishes a competent organ on climate displaced persons, that includes an assembly, a council a fund, as well as a scientific organization like the IPCC, responsible for analyzing projections of climate degradation and forced displacement (Moullec & Martinet, 2023).

However, for Chloé Moullec, all these proposals and initiatives are criticized for failing to consider local realities. They tend to deny possible adaptations and the fact that most of the displacement is internal (Moullec & Martinet, 2023).

The adoption of a dedicated international convention would make it possible to intensify the commitments of States towards a better management of these displaced persons, although the proposal clashes with the divergences of States and the reluctance of international institutions. At the same time, regional instruments, like the Kampala Convention, could be initiated in other geographical areas.

The Kampala Convention

In April 2009, at an exceptional meeting in Uganda, the African Union definitively adopted a Convention on the Protection and Assistance of Displaced Persons, also known as the "Kampala Convention" ((Moullec & Martinet, 2023).

Although no specialized international legal instrument exists to guarantee assistance, relief comes from new African legal instruments. Indeed, this instrument governing the specific aspects of the problems of refugees in Africa and its application to transboundary climate displacement is considered as an *Africanization* of the Geneva Convention (Lobry, 2012). As a matter of fact, the particularity of the African continent, like its traditions of hospitality, are translated into relevant and new regional instruments in the protection of climate displacement (Lobry, 2012). Unlike the traditional regional and international agreements in this area, this Convention has a remarkable peculiarity: it is a binding legal instrument (Lize-Galabe, 2015). The Convention provides a comprehensive normative framework for displaced persons and recognizes the status of “internally displaced” people who have moved within their country for climate reasons (Laurence, 2021) by establishing, in Article 2, a legal framework for both cooperation and prevention. By adopting this convention, the African Union launched a rich instrument that interests environmental refugees.

Domestic Tribunals

For the first time in France the status of an “environmental refugee” was granted on December 18, 2020, by the Administrative Court of Appeal (CAA) of Bordeaux. The Court canceled the obligation to leave the French territory of a Bangladeshi in France in 2011 on the ground of the environmental situation in his country (Deschamps, 2021). One of the reasons given by the Court was air pollution in Bangladesh, which put his health at risk. However the defendant’s attorney was not the first to make this argument. Indeed, there are several cases of residence permit applications following the risks of air pollution to the health of applicants, often asthmatic, as in Nantes in 2015 and 2018, or in Paris in 2016 (Laurence, 2021). All of these applications have been denied to date. The question is whether his case will establish jurisprudence (Deschamps, 2021).

Nonetheless, it must also be possible to prove that the climate situation really endangers the applicant’s health. Indeed, it is a very specific case, and judges can also reject these requests because pollution is only high in big cities, but not in the countryside (Deschamps, 2021).

Unlike the French case, a status of environmental refugee has been rejected by New Zealand’s High Court. In 2013, a resident of the Kiribati Islands, an archipelago in the South Pacific threatened by rising waters, applied for climate refugee status in New Zealand because of global warming for the very first time. His request was rejected because his life was not immediately in danger in 2020, a decision that had been officially condemned by the UN Human Rights Committee (Laurence, 2021). The Committee affirmed that environmental degradation and

the destructive effects of climate change “*represent a threat to the inherent right to life*” set forth in Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR). This situation could therefore potentially constitute a violation of Article 6 if a population is neglected by its government during an ecological disaster (Martinet, 2020).

Ultimately, the decision ignores the long-term reality that climate conditions will lead to extreme scenarios. It does not provide a framework for addressing the applicant’s environmental damage concerns in a comprehensive manner. If the New Zealand’s High Court has expanded the possibilities of recourse, it has made it very difficult for victims to succeed (Martinet, 2020).

For international law to advance in this area, the definition of a status of environmental refugees who are victims of a global “climate injustice” will not suffice, it must be combined with the responsibility of the States responsible for climate change and justice to these victims. States must be held accountable for their contribution to climate change that results in these massive exoduses of environmental refugees. A legal arsenal must be used to condemn those responsible for global warming (Bloch, 2018).

Let us remember this truism issued as a warning by former UN Secretary-General Ban Ki-Moon in 2014: “***There is no ‘Plan B’ because we have no Planet B***”. If States or polluters still need to be convinced of this, the law – consensual or binding – should be another tool to use (Bloch, 2018).

Conclusion

The existing research showed that due to continuous and excessive emissions of greenhouse gases millions of people are forced to move inside their countries or flee to seek refuge beyond their boundaries. It explored several approaches to improve the international protection of environmental refugees and we analyzed the different obstacles and shortcomings of international law for the establishment of an environmental refugee status. The overview this study has carried out showed that it will be more appropriate to use the term “environmentally displaced persons” instead of environmental refugee. The scientific novelty of this study is that it sought to analyze the legal tools of protection of these victims by analyzing proposed solutions, by international law jurists of French and American doctrines.

Recommendations

- It is very important to draw attention to the urgent need for international recognition of the problem, a better understanding of its dimensions and a

willingness to tackle it, by focusing on reducing people's vulnerability to climate change.

- Regional instruments, like the Kampala Convention which provides a comprehensive normative framework for displaced persons could be initiated in other geographical areas.
- States must assume their responsibility for their participation in the degradation of the global environment. Therefore, the principle of *Common but differentiated responsibilities* which is widely known in international environmental law can imply an obligation to States to welcome displaced persons or to finance their reception.

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