

CLIMATE CHANGE AND POPULATION MOVEMENTS

Outline of lecture by Dr. Walter Kälin

Overview

- (A) What are the various climate change scenarios that trigger population movements?
- (B) What is the nature of these movements and who are the affected persons?
- (C) To what extent are these persons protected by present normative frameworks, what are the normative gaps, and who can they be addressed? In particular, how should the case of persons forcibly displaced across international borders be conceptualized? And: Should persons displaced from 'sinking' Small Island States be classified as 'stateless'?

A. Scenarios

The following effects of climate change may cause displacement:

- (i) *Sudden onset disasters*, such as flooding, windstorms (hurricanes/typhoons/ cyclones) or mudslides caused by heavy rain;
- (ii) *Slow onset environmental degradation* caused, *inter alia*, by rising sea levels, increased salinization of ground-water and soil, long-term effects of recurrent flooding, thawing of permafrost, as well as droughts and desertification or other forms of reduced water availability, making certain areas uninhabitable;
- (iii) *Small Island States* becoming uninhabitable as such due to rising sea-levels or even disappearing entirely from the surface of the earth;
- (iv) Designation, by authorities, of *areas as high-risk zones* too dangerous for human habitation, e.g., because of recurrent flooding or other effects of climate change;
- (v) *Unrest seriously disturbing public order, violence or even armed conflict* at least partially triggered by a decrease in essential resources (e.g., water, arable land, grazing grounds).

B. Nature of Movements and Affected Persons

Sudden-onset disasters:

- Experience shows that most of the displaced remain inside their country. As internally displaced persons they receive protection and assistance under human rights law and in accordance with the UN 1998 Guiding Principles¹ on Internal

¹ UN Guiding Principles on Internal Displacement, UN doc E/CN.4/1998/53/Add.2 (11 February 1998). The Guiding Principles were recognized by the heads of state and government at the 2005 World Summit as "an important international framework for the protection of internally displaced persons." World Summit Outcome, GA Res. A/Res/60/1, para. 132; See also GA Res. A/60/168, para. 8; A/Res/62/153, para. 10 and Human Rights Council Resolution A/HRC/6/L.46, para. 6 (c).

Displacement and regional instruments (Great Lakes IDP Protocol² and Kampala Convention³).

- Some of the displaced may cross an internationally recognized state border, e.g., because the only escape route leads there, the protection and assistance capacities of their country are exhausted, or they hope for better protection and assistance. They have no particular protected (legal) status – in most cases, they neither qualify as refugees as defined in nor are they economic migrants. Thus, a normative gap exists, in particular with regard to admission, continued stay and protection against forcible return to the country of origin.

Slow onset disasters (environmental degradation):

- General deterioration of conditions of life and economic opportunities as a consequence of climate change may prompt persons to look for better opportunities and living conditions in other parts of the country or abroad before the areas they live in become uninhabitable. If they move to a foreign country, admission and legal status depend on a sovereign decision by the country of destination, but these persons are protected by general human rights law, including guarantees specifically protecting migrant workers.
- If areas start to become uninhabitable, because of complete desertification, salinization of soil and ground-water or sinking of coastal zones, movements may amount to forced displacement and become permanent as inhabitants of such regions no longer have a choice except to leave – or if they left earlier on a voluntary basis, stay away permanently. If people remain within their country, they are *internally displaced persons* and fall within the ambit of the Guiding Principles on Internal Displacement. If they go abroad, they have no protection other than that afforded by international human rights law in general; in particular, they have no right under international law to enter and remain in another country and, even if admitted, their status remains unclear.

The “sinking” of Small Islands States:

- In the initial phases, this slow-onset disaster will incite persons to migrate to other islands belonging to the same country or abroad in search of better opportunities. If they migrate to another country, they are protected by general human rights law, including guarantees specifically protecting economic migrants, but admission remains the sovereign decision of the country of destination.
- Later, such movements take the character of forced displacement if areas of origin become uninhabitable or disappear entirely, or the remaining territory is inadequate to accommodate the whole population and people become permanently displaced to other countries. In this case, there are normative gaps for those who move abroad, leaving them in a legal limbo as they are neither economic migrants nor refugees and have no recognized right to be admitted to the country of destination.

² Protocol on the Protection and Assistance to Internally Displaced Persons (Great Lakes IDP Protocol), adopted 14 and 15 December 2006.

³ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted 22 October 2009.

Forced evacuation or relocation in the aftermath of the designation of high risk zones too dangerous for human habitation:

- Persons forcibly evacuated or prohibited to return to their homes become internally displaced persons unless they are relocated with full respect of their human rights and allow to regain a normal life. International human rights law, the Guiding Principles on Internal Displacement and analogous norms and guidelines on relocation in the context of development projects provide a sufficient normative framework for addressing these situations.
- Should people decide to leave their country, in particular because they are not offered sustainable solutions in accordance with relevant human rights standards by their own government, protection is limited to that offered by general human rights law, including provisions applicable to migrant workers, but their status remains unclear and they may not have a right to enter and remain in the country of refuge.

“Climate change-induced” unrest, violence and armed conflict:

- Those remaining inside their own country are internally displaced persons protected by the Guiding Principles on Internal Displacement and applicable international human rights and humanitarian law.
- Those fleeing abroad may qualify as refugees protected by the 1951 Convention on the Status of Refugees or regional instruments or are persons who can get subsidiary or temporary forms of protection available for persons fleeing armed conflict.

C. Persons displaced across international borders

This analysis allows to conclude that existing human rights norms and the Guiding Principles on Internal Displacement provide sufficient protection for those *forcibly displaced inside their own country* by sudden-onset disasters (scenario i) or because *their place of origin has become uninhabitable as a consequence of a slow-onset disaster (scenario ii)*, or been declared too dangerous for human habitation (scenario iv). Existing international law (international humanitarian law, human rights norms, Guiding Principles on Internal Displacement, refugee law) is also sufficient to protect persons displaced by a breakdown of law and order, violence or armed conflict triggered by the effects of climate change, regardless of whether they cross an internationally recognized state border (scenario v). The main challenge is to clarify or even develop the normative framework applicable to persons *crossing internationally recognized state borders* in the wake of sudden-onset disasters (scenario i), as a consequence of slow-onset disasters (scenario ii), in the aftermath of the “sinking” of Small Island States (scenario iii), or in the wake of designation of their place of origin as high risk zone too dangerous for human habitation (scenario iv).

1. Identifying persons in need of protection abroad

The point of departure to identify those in need of international protection should not be the subjective motives of individuals or communities for their decision to move, but rather whether, in light of the prevailing circumstances and the particular vulnerabilities of the persons concerned, *it would be inadmissible, not feasible or unreasonable to return them to their country of origin.*

- *Permissibility*: Human rights law, by analogy to the refugee law principle of non-refoulement, prohibits in some cases return. The first example is the prohibition against returning someone to a situation when there are substantial grounds to believe that an individual would face a real risk for life and limb. This prohibition was derived by the European Court of Human Rights⁴ and the UN Human Rights Committee⁵ from the prohibition of torture, cruel and inhuman treatment. The second example is the prohibition of collective expulsion, *i.e.* the collective return of affected persons that is not based on an individual assessment.⁶
- *Feasibility*: Return may be factually impossible due to temporary technical or administrative impediments, such as when roads are cut off by floods. Return is also impossible if the country of origin refuses readmission for reasons such as the temporary lack of capacity to absorb large return flows or the inability to determine whether a particular person is a citizen. Return of citizens of Small Island States will be impossible if the island as such has become uninhabitable or disappeared.
- *Reasonableness*: From a humanitarian perspective, return may not be reasonably required from persons concerned, for example, if the country of origin does not provide any assistance or protection or if what is provided falls far below international standards. The same is true where authorities do not provide any kind of durable solutions to the displaced in line with international standards.

If the answer to one of the following questions – Is return *permissible*? Is it *feasible*? Can it *reasonably be required*? – is ‘no’, then individuals concerned should be regarded as victims of forced displacement in need of specific protection and assistance in another State and granted at least a temporary stay in the country where they have found refuge. Permanent solutions on the territory of other States must be found where such extended parts of a country have become uninhabitable that it no longer can host its entire population.

Protection regimes to close the existing normative gap and provide protection to those who were forced to cross an international border due to the effects of climate change and cannot be returned (at least temporarily) can be developed either at the domestic or the international level. *Domestic laws* may draw inspiration from existing provisions in domestic law addressing *subsidiary or temporary protection* that provide for such protection in the case of persons displaced by the effects of climate change and other envi-

⁴ E.g., European Court of Human Rights (Grand Chamber), *Chahal v The United Kingdom*, Reports 1996-V, para. 74.

⁵ E.g., Human Rights Committee, General Comment No 20 (1992), para 9; *C v Australia*, Communication No 900/1999 (2002), para 8.5; and *Byahuranga v Denmark*, Communication No 1222/2003 (2004), para 11.3,

⁶ This prohibition is implicit in Article 13 ICCPR and explicit in Article 12(5) American Convention on Human Rights of 22 November 1969; Article 26(2) Arab Charter on Human Rights of 22 May 2004; and Article 4 Protocol 4 to the European Convention on Human Rights of 4 November 1950; 213 UNTS 221.

ronmental factors (e.g. temporary protection status in natural disaster situations in the USA and similar provisions in the laws of Scandinavian countries). At the international level, attempts to adopt new conventions may be more successful at the regional than at the UN level, but the topic should also be addressed in any new instrument on climate change.

2. *The Special Case of Persons Displaced from Submerged Small Island States*

The case of 'sinking' Small Island States that cease to exist raises particular problems: Will their populations become stateless under the Convention relating to the Status of Stateless Persons of 6 June 1960?

According to Article 1 of the Convention 'the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.' Statelessness thus means being without nationality, not without state. Persons do not become stateless as long as there is some remaining part of the territory of their State with a government continuing to exist, and even where the whole territory of a country disappears it is far from certain that its laws 'sink' with it: While States, according to a traditional understanding, come into existence when they have '(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states'⁷, they do not automatically disappear when one element falls away. Rather, in modern international law there is, 'a strong presumption against the extinction of States once firmly established.'⁸ Submerged Small Island States will not be likely to withdraw their membership in the United Nations nor is it likely that they will be excluded from that and other international organizations. More likely, their governments will try to retain at least a symbolic presence on their former lands, e.g. by building up a small island or surrounding it by dikes, even if such land is too small to host any relevant part of their population, or to gain some new territory where their State continues to exist. It will also continue to grant citizenship.

International law would even be flexible enough to provide continued existence to such States as non-territorial entities as evidenced by the Order of Malta, a subject of international law that continued to exist to this day even after it lost its territorial base in Malta when Napoleon Bonaparte occupied the island on 12 June 1798. All that is needed is a consensus by the international community in this regard.

The key issue, thus, is not the question of statelessness but rather as to how it can be ensured that citizens of sub-merged island states are admitted to other countries on a permanent basis where they can keep their nationality of origin even if they or their descendants acquire the nationality of that country. In this context, the question of the responsibility of the international community, in particular regarding relocation, must be clarified as well. In other words, new law will be required if we are to avoid these populations becoming marginalized and disenfranchised inhabitants of their countries of refuge.

⁷ Art. 1 Montevideo Convention on the Rights and Duties of States of 26 December 1933.

⁸ J. Crawford, *The Creation of States in International Law*, (Oxford, Clarendon, 2006, 2nd ed), p. 715.