10 Climate change, migration and human rights

Towards group-specific protection?

Benoît Mayer and Christel Cournil

Introduction

Much has recently been written on the question of the protection of environmental migrants, that is, people displaced in connection with environmental phenomena, and, more specifically, ‘climate’ migrants, where such phenomena can be regarded as effects of climate change. The idea of reforming international refugee law through an amendment to the 1951 Convention relating to the Status of Refugees was swiftly rejected, in part through fear of undermining the fragile achievement of the protection of refugees, but also partly because substantial differences between environmental migrants and refugees do not seem to allow such an analogy. Unlike persecution, environmental factors mostly generate internal migration (that is to say, migration within national borders) and the emerging standards of protection and assistance to internally displaced persons (IDPs) are of great relevance. By focusing on international migrants, however, some authors have preferred to discuss possible mechanisms of complementary or subsidiary protection, previously developed for people who could not return to their country of origin because of armed conflicts or widespread violence, which, they argue, could extend to environmental migrants or, at least, to some of them.3

In addition to the lack of support by critical States, these proposals face technical obstacles. It is particularly difficult to identify environmental migrants, and a fortiori ‘climate’ migrants, because of the indirect and complex causal links between

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environmental phenomena and migration. Few people spontaneously identify themselves as environmental or ‘climate’ migrants. Since climate change is a change in the probability of specific weather events, it is quite problematic to attribute a specific environmental phenomenon to it. More generally, the concepts of climate or environmental migration often seem too broad to be operational, as they include internal migrants and international migrants, as well as voluntary migrants and forced migrants, regardless of the duration or distance of the displacement. This combination of political and technical obstacles makes the adoption of a convention relating to environmental or ‘climate’ migrants quite unrealistic, and thus the ongoing Nansen Initiative of Switzerland and Norway seems to be moving toward the promotion of a non-binding, guiding document on the protection of people displaced across borders in the context of disasters and other environmental phenomena possibly related to climate change.

This chapter consists of an assessment of the need for specific protection of environmental or ‘climate’ migrants. It is based on an apparent paradox between the existence of universal human rights instruments (which, being universal, apply equally to environmental migrants) and the development of group-based protection mechanisms. Each State has an obligation, under relevant international human rights law instruments, to respect and protect the rights of any individuals within its jurisdiction, including environmental migrants. In the past, group-specific mechanisms have, however, been established to protect the rights of women and children, racial, national or religious minorities, refugees and Stateless persons, migrant workers and members of their families, and people with disabilities – and debates are now extending to the rights of indigenous peoples and the elderly. Should environmental or ‘climate’ migrants also be the object of specific protection?

The discussion is organised in three sections. The first section explores the applicability and limits of general international human rights law in responding to the need for protection highlighted by the debate on environmental migration. The second section explores how existing group-specific protection applies to environmental or ‘climate’ migrants. Finally, the third section assesses the risks and opportunities of moving toward a category-specific protection of environmental or ‘climate’ migrants.

1. The applicability of general human rights instruments to environmental or ‘climate’ migrants

International human rights law recognises certain fundamental individual rights that are considered essential to human dignity. For the purpose of this chapter, general human rights protection is defined by reference to non-group-specific instruments such as the UDHR, ICCPR and ICESCR, and regional instruments such as the EU instruments, noting that these instruments are under different jurisdictions, as well as under the jurisdiction of relevant international human rights bodies, within its jurisdiction or as part of a relevant treaty (e.g., the general human rights.

It is now well recognised that multiple human rights instruments provide a multitude of interconnected protection mechanisms. Within this context, the following sections discuss security and rights.

The right to non-discrimination forms the core of our analysis. It is clear that human rights protection is a recognition of a human being's right to decide who they are in society. This means that different situations may require different protections, as equality goes hand in hand with human rights. Attention is paid to the protection of the rights of environmental migrants.

It is, however, important to note that there are distinct categories of environmental migrants. Situations of vulnerability are discussed here, and attempts to migrate are also highlighted. The vulnerability of those wishing to migrate (vulnerability and migration) is discussed in this section. The vulnerability of environmental migrants is discussed in this section.

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6 See Human Rights Watch, ‘Protecting Environmental Migrants’. 7 See Sébastien J. a Legal Reference to Human Rights Protection. 8 Francois Crépeau et al., ‘Environmental Protection’ (2012), featurin...
such as the ECHR. General human rights protection also includes rights-specific instruments, such as the 1986 Declaration on the Right to Development. The rights that these instruments recognise are applicable to any persons within the jurisdiction of a State bound by them: every State has the duty to protect all persons within its jurisdiction, irrespective of nationality. As long as States have ratified relevant treaties, environmental or ‘climate’ migrants should therefore benefit from general human rights protection.

It is now well understood that climate change can have diverse consequences on multiple human rights, particularly on economic, social and cultural rights. Environmental phenomena that generate migration may affect the enjoyment of a multitude of rights, such as the rights to life, health and food, along with partially recognised rights, such as the right to a healthy environment and to development. Within this context, migration may also challenge the rights to housing, property, security and non-discrimination, among others.7

The right to substantive equality is of particular importance in the context of our analysis. Formal equality implies the right not to be discriminated against, that is, that persons in similar situations should not be treated differently without justification. However, sometimes the application of similar treatment in very different situations can result in an unfair difference of treatment. Thus, substantive equality goes further: it requires different treatment for significantly different situations. Accordingly, particularly vulnerable persons must be given special attention,8 and thus the right to substantive equality can be an argument for specific protection of the rights of vulnerable populations under general human rights law.

It is, however, difficult to consider environmental or ‘climate’ migrants as a distinct category of vulnerable individuals. Environmental phenomena can create situations of vulnerability that may cause migration, but populations that do not migrate are also vulnerable – sometimes even more so if they are unable to migrate owing to a lack of resources.9 Migration itself can be a source of vulnerability, but the vulnerability of migrants does not depend on the cause of migration (vulnerability and precariousness are rather a product of the circumstances where migration takes place). Some experts have preferred concepts that highlight the vulnerability of migrants, such as ‘survival migration’10 or ‘crisis migration’,11 which are discussed in the last section of this chapter.

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9 FORECAST (2011).
Some general human rights, recognised by non-specific instruments, only become relevant in the context of migration. Thus, under Article 13(1) UDHR, ‘everyone has the right to freedom of movement and residence within the borders of each State.’ Similarly, Article 12(1) ICCPR provides that ‘everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.’ This right is also recognised in the framework of the Council of Europe, under Article 2(1) of the Fourth Protocol (1963) to the ECHR, where it is also limited to ‘everyone lawfully within the territory of a State.’

Restrictions to Article 12(1) ICCPR are only allowed if they are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant. Thus, any person within the jurisdiction of a State that is party to the ICCPR has the right to migrate within the State where he or she is present, unless the conditions for a restriction are met. However, the concepts of national security, public order or the protection of the rights and freedoms of others are notoriously flexible.

Persons wanting to migrate also benefit from Article 13(2) UDHR, which states that ‘everyone has the right to leave any country, including his own.’ This is reaffirmed in similar terms in Article 12(2) ICCPR and in Article 2(2) of the Fourth Protocol to the ECHR. Thus, people from a State that is particularly affected by environmental phenomena which may be related to climate change cannot be prevented from leaving their country. Permissible restrictions on the right to freedom of movement and residence are also applicable to the right to leave one’s country (ICCPR, Art 12(3)). In practice, however, it is most often the absence of the right to enter a third country which limits the right to leave one’s country.

Moreover, Article 14 UDHR states that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution.’ Along these lines, Article 3(1) of the 1967 Declaration on Territorial Asylum not only prohibits expulsion (refoulement), but also ‘rejection at the frontier’ of persons entitled to invoke Article 14 of the Universal Declaration of Human Rights. Unlike the aforementioned rights, this one has not been subsequently confirmed by the ICCPR nor by the ECHR and its protocols. The 1951 Convention relating to the Status of Refugees provides that refugees have the right not to be expelled or forcibly returned to ‘the frontiers of territories where [their] life or freedom would be threatened’, but it stops short of an explicit recognition of the right of an asylum-seeker to enter the territory of a third State. More importantly, the Refugee Convention only protects individuals in cases of ‘persecution’. Persecution necessarily implies the will to harm: those displaced as a result of environmental phenomena, such as those fleeing conflict refugees, do not have the right to refugee status.

The possible interpretation of ‘refugees’ other than people from a State party to the Refugee Convention, and in situations of so-called ‘armed conflict’, is problematic. However, given the complex nature of situations of environmental displacement, it might be possible to say that ‘everyone’ has a right of entry into another country in more realistic situations.

Finally, Article 26(2) UDHR provides for the right to return to one’s country. Similar to the right to enter, the Protocol to the Convention provides scope for restricting the territory of a State party or categorising asylum seekers, with no other conceivable possibilities.

Overall, general human rights instruments may not afford some for environmental or ‘climate change refugees’. The abstract principles behind these rights and restrictions, linking human rights to the changing environment, do not necessarily mean that they are generally applicable. This is especially so in cases of unique individuals of a certain nationality, who are unable to return to their country.

2. The suitability of general human rights instruments

In the field of the environment, human rights have been adopted in the form of general human rights, generally applicable to all human beings, with no specific generation rights. These may not necessarily be relevant in cases of environmental displacement, where the rights of the individual, their family, and those around them are the most important consideration. Therefore, it is necessary to consider whether these rights are suitable for protecting individuals in cases of environmental displacement, or whether they need to be adapted or replaced with new rights.
phenomena are not generally 'persecuted' and cannot convincingly invoke the Refugee Convention. While diverse regional instruments have extended the protection of refugees, including the implicit right to asylum, it has generally been in situations where displacement is directly caused by human agency, such as armed conflicts or generalised violence.

The possibility of amending the law to include a right to asylum in circumstances other than persecution has been considered. An Australian political party has thus proposed the recognition of a 'right to environmental asylum' for populations of small island States whose atolls are directly threatened by rising sea levels. However, given the reluctance of States to respect the right to asylum in conventional situations of persecution, it is questionable whether the right to asylum on environmental grounds would be generally recognised. The acknowledgement of a right of entry on a case-by-case basis for small island populations seems much more realistic.

Finally, Article 13(2) UDHR recognises to everyone ‘the right to return to his country’. Similarly, the ICCPR states that ‘[n]o one shall be arbitrarily deprived of the right to enter his own country’. More restrictively, Article 3(2) of the Fourth Protocol to the ECHR states that ‘[n]o one shall be deprived of the right to enter the territory of the State of which he is a national’. Of course, this right applies to any categories of environmental or ‘climate’ migrants as much as it does to any other conceivable category of persons or, indeed, to anyone.

Overall, general human rights instruments providing non-group protection afford some foundations for the protection of any migrants – including environmental or ‘climate’ migrants. General human rights instruments define relatively abstract principles that States commit to respect in all circumstances, unless restrictions, limitations or derogations apply. Owing to their general nature, these principles do not always exactly match the specific protection needs of all. More generally, law, by its abstract nature, often strives to deal with the infinite range of unique individual circumstances.

2. The suitability of group-specific human rights instruments

In the field of the international protection of human rights, specific standards have been adopted in several ways. There has been a trend towards the clarification of generally applicable rights, or the definition of new rights (especially third generation rights). Another trend, which is of greater interest here, is towards the

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16 ‘His country’ or ‘his own country’ may extend not only to the country of the person’s nationality, but also to a host country, especially in the case of refugees and Stateless persons.
definition of the rights of specific categories of individuals, from women to migrant workers and from indigenous peoples to children.\textsuperscript{17}

Group-specific protection instruments were developed well before the adoption of general instruments such as the UDHR, aimed in particular at the protection of national minorities and refugees since the 19th century. Yet, the adoption of general protection instruments has not put an end to specific protective tools. Major pre-existing specific mechanisms have remained relevant, such as the protection of refugees defined by the 1951 Convention relating to the Status of Refugees. Moreover, new mechanisms for group-specific protection have been adopted following the implementation of general protective measures, for example, the 1989 Convention on the Rights of the Child, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the 2006 Convention on the Rights of Persons with Disabilities. Other soft law instruments or ongoing proposals relate to the protection of internally displaced persons, indigenous peoples, the elderly and prisoners. Proposals for the protection of environmental or ‘climate’ migrants would also be a form of group-specific protection.

How far should group-specific protection extend? Too many laws may diminish the authority of laws and reduce their intelligibility. While a number of specific rules may contribute to a fairer law, equally, too many specific rules run the risk of making the law arbitrary and unintelligible.\textsuperscript{18} A balance must therefore be found between rules that are too general and rules that are too numerous and obscure. Above all, it is important to consider the relevance of group-specific protection not only in terms of the individuals it includes, but also of those it excludes — in relation to its direct benefits as well as its unintended consequences.

Before considering the relevance of group-specific protection for the benefit of environmental or ‘climate’ migrants, it is useful to explore experiences from the protection of other vulnerable groups and question the applicability of these regimes to environmental migration. Four group-specific human rights treaties are particularly relevant to the situation of environmental or ‘climate’ migrants, concerning the protection of refugees, Stateless persons, migrant workers and IDPs.

\textsuperscript{17} What Frédéric Mégret described as the ‘pluralisation of human rights’ not only involves an analysis of existing rights or a learning process that enables the implementation of an international advocacy effort, but also the adaptation of certain rights to the particular circumstances of certain categories of people with more specific needs. The Convention on the Rights of Persons with Disabilities, for example, includes an affirmation of existing rights, some reformulations and also some extensions and legal innovations. See Frédéric Mégret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2006) 30(2) Human Rights Quarterly 491.

\textsuperscript{18} To control the proliferation of rights, Philip Alston, for example, has proposed a mechanism for the monitoring of new rights, a form of ‘appellation controlée’ (certified designation of origin) that would at least guarantee compliance with a certain design process before the approval of new rights by international institutions, particularly facilitating broad and transparent consultation. See Philip Alston, ‘Conjuring up New Human Rights: a Proposal for Quality Control’ (1984) 78(3) American Journal of International Law 607.

First, it needs to be noted that treaties cannot serve as examples in

\textbf{2.1. Refugees}

Building on the 1951 Convention relating to the Status of Refugees, with which \textsuperscript{19} the UDHR had just been made a treaty with a unified status, the 1966 Convention obligated the States to:

The Refugee Convention states that, nonetheless, recognition is not an option for everyone. At first glance, the specific right to asylum is a right for refugees. In recognition, a refugee has the right to seek and enjoy asylum for reasons of real or feared persecution, political opinion, or membership in a national group to such fear.

Some States have adopted a blanket, either unilaterally or as a party to the Convention, an additional protective measure against aggression, or national order.\textsuperscript{20} The States of Latin America, for example, who ‘have formed a people threatened by an invasion or a violation of their independence or their public order,’ in treaties particularly important, notably by reason of

\textsuperscript{19} Article 33,

\textsuperscript{20} Article 1(A)(2)

UDHR, the need to the ground of ratification of the

\textsuperscript{21} See, Jane McAvoy,

\textsuperscript{22} Article 1(2),

\textsuperscript{23} III(3).
First, it needs to be determined whether, and to what extent, such group-specific treaties can apply to environmental or ‘climate’ migrants. Second, these historical examples illustrate crucial issues relating to group-specific protection.

2.1. Refugees?

Building on a system of bilateral treaties for the protection of specific groups of refugees developed during the interwar period, the Convention relating to the Status of Refugees was adopted in 1951. Although the UDHR and the ECHR had just been adopted in the early 1950s, the 1989 Convention on the Protection of All Persons under Any Form of Coercion or Punishment and Their Families, including Displaced Persons, Other soft law and international standards may also be relevant. The protection of refugees, however, does not contain group-specific provisions.

Sometimes, the risks may diminish with the addition of specific groups. For example, refugees may be at risk of persecution before being found to be members of a particular social group and, therefore, not be found to be refugees. The protection of refugees therefore excludes – in some cases, inadvertently – in some cases, specifically those who fall within the benefit of other international instruments. The possibility of these individuals being protected by other international human rights treaties and by instruments that others, in particular, ‘climate’ migrants, are included in. For example, climate refugees and IDPs.

19 Article 33.
20 Article 1A(2), emphasis added. Although the condition of ‘persecution’ is mentioned in the UDHR, the negotiators of the Refugee Convention found it necessary to add a condition relating to the ground of persecution. The narrow definition of a refugee reflects the great caution of the drafters of the Convention.
21 See Jane McAdam, Complementary Protection in International Refugee Law (Oxford University Press, 2007).
22 Article 1(2).
23 III(3).
armed conflict. However, rather than offering tangible protection, some of these provisions seem more a façade. The AU Convention, for example, has not been implemented systematically. In the framework of European legislation, the condition of indiscriminate violence posing an individual threat is vague and somewhat paradoxical, which means that there is a risk of arbitrary interpretations.

More fundamentally, environmental or ‘climate’ migrants cannot be considered ‘persecuted’ and thus do not fulfil the conditions to qualify as refugees under Article 33 of the Refugee Convention. These migrants should therefore not qualify as refugees for the purpose of the Refugee Convention. Nor can they rely, generally speaking, on additional protection mechanisms, except perhaps when they are displaced by violence generated by environmental phenomena. Thus, unsurprisingly, courts have denied refugee protection when it was invoked on the ground of environmental factors. For instance, the High Court of New Zealand considered inadmissible a request for refugee protection of individuals who highlighted environmental circumstances in their country of origin, Kiribati. The Court noted growing scientific evidence on the impacts of climate change on this small island developing State, but rejected the application as:

[a] person who becomes a refugee because of an earthquake or growing aridity of agricultural land cannot possibly argue, for that reason alone, that he or she is being persecuted for reasons of religion, nationality, political opinion, or membership of a particular social group. 26

2.2. Stateless persons?

In order to assess whether group-specific human rights protection provided to Stateless persons is relevant in the context of environmental migration, a fundamental distinction must be drawn between de facto and de jure Statelessness.

On the one hand, de facto Statelessness relates to a situation where a person is not effectively protected by his or her State of nationality. Refugees are de facto

Stateless persons de facto are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals. See also Hugh Massey, UNHCR and De Facto Statelessness, LPPR/2010/01 (2010).

Stateless, by definition on a human rights protection basis because of the adverse impact of fact Stateless persons, this

On the other hand, are not considered States (possibly to the Status and includes of ‘national persons, which eventually be disappear. It is, however, in the classical sense, matters. In any case, the material effective by the generally instruments and yet, from a Stateless person, ‘climate’ migration arguments for
Stateless, but other persons who are de facto Stateless do not fall within the narrow definition of a refugee. De facto Stateless persons are not the object of any specific protection in international law. When a State is unable to protect its citizens because of environmental phenomena, for instance in the occurrence of severe adverse impacts of climate change, it is possible to consider these nationals as de facto Stateless, but, in the absence of any specific protection of de facto Stateless persons, this categorisation has no legal effect.28

On the other hand, de jure Statelessness relates to the situation of persons who are not considered nationals by any State.29 The protection of de jure Stateless persons, which was first debated in conjunction with the protection of refugees, eventually became the subject of a specific treaty, the 1954 Convention relating to the Status of Stateless Persons. This instrument has a low level of ratification and includes few rights beyond the prohibition of expulsion not justified by reasons of “national security or public order.”30

To be considered de jure Stateless, and to fall into the scope of the 1954 Convention relating to the Status of Stateless Persons, environmental or ‘climate’ migrants would need to cease to be recognised as nationals by their State of origin. If a State ceases to exist, as has been envisaged in the case of some small island States (possibly because territory becomes uninhabitable, even before the whole State is submerged by sea-level rise), its citizens would arguably become Stateless. It is, however, difficult to determine how a State could cease to exist (outside of the classical scenarios defining State succession), even when its habitable territory disappears. Such an event is unprecedented and is not necessarily governed by rules that are applicable to the creation of a State.31

In any case, formal protection as de jure Stateless persons would be of little material effect for environmental or ‘climate’ migrants. The protection of de jure Stateless persons provides no right of entry or residence in the territory of a third State, and rights under the 1954 Convention hardly go beyond those guaranteed by the general protection of human rights. General international human rights instruments are also more largely ratified and more systematically implemented.

Yet, from a political perspective, the existence of a regime for the protection of Stateless persons may make a difference. The categorisation of environmental or ‘climate’ migrants as possibly Stateless persons may come in support of political arguments for the recognition of the need for international protection. Along these

28 See UNHCR, Climate Change and Statelessness: an Overview (15 May 2009) 2.
29 Article 1 of the 1954 Convention relating to the Status of Stateless Persons: ‘For the purpose of this Convention, the term “Stateless person” means a person who is not considered as a national by any State under the operation of its law.’
30 Article 31.
lines, the specific protection of Stateless persons has come to have mostly an expressive function, helping to set protection for certain categories on a political agenda, rather than a strictly legal function based on positive norms.

2.3. Migrant workers?

Every State has the duty to protect all persons within its jurisdiction, irrespective of nationality. Apart from the right to return to one’s country and electoral rights, foreigners and Stateless persons have the same rights as nationals of the State in which they are situated. However, the adoption of instruments for the general protection of human rights has not prevented a growing demand for group-specific protection of migrant workers, which – paradoxically – has been met with hostility from many States. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted on 18 December 1990, did not come into force until 2003, and only includes around 50 State parties.

For the most, the Migrant Workers Convention does not define new rights (although it clarifies a few), but it reafirms the rights of migrants embedded in general human rights instruments. It includes in particular a list of fundamental rights that must be guaranteed for migrant workers lacking documentation or who are in an undocumented situation. While the universal and irrevocable nature of rights leaves no doubt as to their application to undocumented migrants, such provisions are extremely controversial, and explain the reluctance of many States to ratify the Migrant Workers Convention. However, despite its lack of ratification, the Migrant Workers Convention – just like the Convention relating to the Status of Stateless Persons – provides a significant basis for domestic rights advocacy in favour of migrant workers. It participates in a pedagogical endeavour of advancing the effective implementation of general international human rights law with regard to a specific category of individuals that States tend not to protect effectively.

Environmental factors may incentivise displacement either through affecting living conditions at the place of origin (‘push factor’, for instance in the case of a drought) or through providing new opportunities at the place of destination (‘pull factor’, for instance when warming allows agricultural development). Some environmental or ‘climate’ migrants may not qualify as migrant workers or members of their families, most obviously isolated individuals who do not work (such as kids travelling alone). Yet, the group-specific protection of migrant workers is likely to be numerically much more relevant to these migrants than the protection of refugees and Stateless persons.

2.4. Internally displaced persons?

The general protection of human rights applies to persons who move within their State. A trend has developed, particularly since the end of the Cold War, to promote the concept of IDPs. Like refugees, internally displaced persons (IDPs) have been underpinned by an international human rights framework. The 1996 Principles on Protecting and Assisting Internally Displaced Persons, adopted by the UN General Assembly, define IDPs as those who are forced to leave their homes because of ‘events seriously disturbing public order’ (situations that are often referred to as ‘internal conflict’ or ‘political violence’).

Advocacy for the protection of IDPs, and relating to the internal displacement of refugees, has been particularly active. The protection of IDPs has been reflected in the work of the UNHCR and other international organizations and human rights organizations. The Protection Handbook of the UNHCR provides a comprehensive guide to the protection of IDPs, including the rights and obligations of States and non-State actors.

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promote the group-specific protection of IDPs. It has emerged that many States have been unwilling or unable to provide sufficient protection to IDPs, in particular with regard to the specific protection needs of these populations.

Unlike refugees, IDPs remain on the territory of States affected by the cause of departure, whose resources may already be strained by the cause of displacement (such as a conflict or a natural disaster). Large-scale internal displacement frequently results in situations of vulnerability, in particular because of a lack of capacity of the State to provide protection.

Advocacy in the 1990s called for specific efforts to effectively protect the rights of IDPs. Like any group-specific protection, however, the risk was that attention and resources could be arbitrarily diverted from other issues — here, most evidently, from the protection of non-displaced individuals. As James Hathaway argued in 1996, ‘we ought not [to] privilege those who are displaced, effectively doing a disservice to those who are trapped in their own homes, and we ought simply to get about the business of enforcing international human rights law internally.’

The enhancement of the protection of displaced persons may be part of a humanitarian dynamic in response to perceived suffering: the media in particular find it more straightforward to portray the suffering of displaced persons than that of non-displaced people, although their suffering may be equally or more severe. This illustrates an important caveat for group-specific protection, which may be based on arbitrary distinctions and, by diverting attention from those most in need, may result in an inadequate allocation of limited protection resources.

The protection of IDPs developed in particular from the 1990s in two parallel ways: an effort at reaffirming the primary obligation of each State to protect the population within its jurisdiction on the one hand, and an attempt at upgrading assistance from third States on the other hand. Consultations were undertaken by Francis Deng, on behalf of the Secretary-General of the UN and with significant material support from the Brookings Institute, leading to the adoption of the Guiding Principles on Internal Displacement in 1998. Many countries have incorporated these principles into national law or have drawn considerable inspiration from them, within a dynamic that contributed to an increased domestic and international focus on the vulnerability of IDPs. The 2009 Convention on the Protection and Assistance of Internally Displaced Persons in Africa, which came into force in 2012, is also inspired by the Guiding Principles. On the other hand, efforts were made to promote international solidarity through the creation of the UN Office for the Coordination of Humanitarian Affairs in 1991 and a better definition of the responsibilities of humanitarian organisations (cluster approach) in 2005, as well as the progressive development of the ‘responsibility to protect’ doctrine.

The objective of a group-specific protection of IDPs is not to recognise new rights, but to reaffirm existing rights and to create a momentum for their effective

protection. The Guiding Principles do not constitute a formally binding document. They do not create new rights, but solely ‘codify’ the rights already recognised to IDPs – in particular in international human rights law, as well as international humanitarian law and, by analogy, international refugee law. The IDPs – like anyone else – have a right to life, to physical, mental and moral integrity, to liberty and security of the person, and to an adequate standard of living, among others. The definition of an IDP in the Guiding Principles, which include ‘natural and human-made disasters’ among the causes of departure, should not be approached as a restrictive definition, but rather as an illustrative one. The persons displaced in relation to slow-onset environmental changes, if they are in a similar situation of vulnerability, should, under international human rights law, be protected in the same way as IDPs. Yet, beyond promoting international assistance, the Guiding Principles have done little to address the issue of a lack of capacity of the State concerned, on the territory of which large movements of populations occur, to protect displaced persons. When a State is severely affected by the adverse impacts of climate change, in particular by slow-onset environmental changes, its protection capacities are likely to decrease (for instance, diminished fiscal revenues) while the protection needs of its population increase.

3. Opportunities and risks of a new group-specific protection

In light of the current international protection of human rights and the experience of the four group-specific protection mechanisms discussed above, what are the risks and opportunities associated with group-specific protection of environmental or ‘climate’ migrants?

3.1. Approaching migration through green lenses

The rationale for group-specific protection to the benefit of environmental or ‘climate’ migrants may relate to sheer political expediency. The four examples of group-specific protection presented in the previous section show that such protective measures are only implemented in very specific political circumstances, in particular when an international crisis paves the way for structural changes in global governance. Thus, the first steps for the international protection of refugees followed the Great War, and the systematic protection provided by the Refugee Convention appeared necessary and possible in the post-Second World War reconstruction era. The protection of Stateless persons broadly followed the same dynamic. Like the Guiding Principles, they developed in response to the need to redefine the human rights needs for groups that fall outside the scope of the international law. Yet, the UNFCCC and the Kyoto Protocol redefined the need for action on climate change and its effects.

The appeal of the ‘climate’ migrants category provides a tactical advantage: it invites the parties to the climate negotiations (and, indeed, to the six international instrument, migration, human rights, and development) to ‘internalise’ regional and global ‘climate mobility’ in their decision-making, and to extend their protection capacities to those that are particularly vulnerable, including migrants. The climate negotiations during COP 21, which included, for instance, an explicit commitment to protect migrants, have been a sign of this shift.

Yet, even the ‘climate’ migrants are not a panacea. A particular problem of the ‘climate’ migrants is that the migration risks of environmental migrants, like other environmental migrants, are largely ignored. The needs of these populations, in particular, are not addressed in existing protection mechanisms. As a matter of principle, migrants are not considered to be ‘refugees’ for the purposes of the 1951 Refugee Convention and are therefore not considered to be entitled to international protection. As a matter of practice, many environmental migrants are unable to migrate and are forced to remain in their home countries. They may have to cope through migration, but this is not an option. Yet, the migration risks of environmental migrants are, indeed, not well understood, and also have largely been ignored in the negotiations.

The protection of environmental migrants is logistically and financially challenging. The resources to protect vast populations, particularly in the face of the destruction of the natural environment and in the face of the destruction of the natural environment and climate change, are limited.

34 Principle 10.
35 Principle 11.
36 Principle 12.
38 Introduction, [2].
39 UNFCCC, Ganz. 40 UNFCCC Decision
dynamic. Likewise, the specific protection of migrant workers and IDPs was developed in the context of a growing influence of the third world and of the new beliefs in global governance that accompanied the dissolution of the USSR. The needs for governance were not new, but new circumstances created windows for policy change. In turn, climate change creates a political momentum for innovation – an opportunity for important and much-needed reforms that address pre-existing needs. Linking migration to climate change might constitute an opportunity to bring the protection of migrants to the forefront of international political debates.

The appearance of the migration issue within climate change negotiations provides a taste of the political expediency for the protection of environmental or ‘climate’ migrants. The Cancun Agreements adopted by the 16th COP of the parties to the UNFCCC have thus called for ‘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.’\(^{39}\) Two years later, COP 18 cited ‘human mobility’ in the definition of a research programme on the approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.\(^{40}\) These negotiations did not set specific obligations for the protection of the human rights of migrants, but they have certainly helped to draw attention to the plight of migrants in the context of climate change or, more broadly, to environmental changes.

Yet, even though a linkage between migrants’ protection and negotiations on climate change may appear politically expedient, this approach is not without risk. A particular problem is that of a non-optimal allocation of resources for protection – a problem similar to the one highlighted by James Hathaway in the broader context of IDP protection. While the adverse impacts of climate change and other environmental phenomena may exacerbate the vulnerabilities of certain populations, in particular migrants, it remains that environmental or ‘climate’ migrants are certainly not the sole or the most vulnerable population that needs protection. As a mechanism for coping with environmental phenomena, in principle, migration enables migrants to reduce their risks. The persons who are unable to migrate are by definition more vulnerable than those who are able to cope through migration. Politically, stationary populations are less visible and more easily forgotten than large populations of ’refugees’ gathered in makeshift camps, and also have less access to organisations that provide protection and assistance. The protection of stationary populations is often a greater challenge both logistically and financially.

The resources of any State are limited and environmental phenomena that put vast populations at risk have the concomitant effect of reducing the protection capacity of the affected States (in particular by means of a reduction of fiscal

39 UNFCCC, Cancun Agreements, Decision 1/GP.16 (2010) [14(6)].
40 UNFCCC Decision 3/GP.18 (2012) [7].
revenues), a State severely affected by environmental phenomena such as adverse impacts of climate change cannot commit to providing a better level of protection to its migrants without running the risk of diverting critical resources away from the protection of non-displaced populations.

3.2. Environmental or ‘climate’ migrants and their others

Any legal category draws a circle in the sand: some people are within the circle, others are outside. Group-specific protection of environmental or ‘climate’ migrants would exclude both non-environmental migrants (or environmental migrants who are not ‘climate’ migrants) and persons affected by environmental phenomena who do not move, possibly for lack of financial or social resources. Yet, these other populations may be more vulnerable than environmental or ‘climate’ migrants.

In principle, a group-specific protection mechanism should address specific protection needs. Yet, there seem to be no specific protection needs attached to the vague category of environmental migrants, and, a fortiori, ‘climate’ migrants, given in particular the many different ways in which environmental phenomena may cause migration. At most, it can be argued that certain subgroups of environmental or ‘climate’ migrants have specific needs for protection. In particular, in the eventuality where an island State ceases to exist and needs to be evacuated, its population would be in a unique situation of Statelessness: it would then be important to define new obligations for the protection of this population and to enable the naturalisation of such a population, or to establish a mechanism for the maintenance of a specific collective identity that would guarantee respect for individual rights. Similarly, but in a less clear-cut manner, it would probably be appropriate to allow the international migration of persons living in a State that has gone beyond its carrying capacity and become subject to major environmental changes, even if that State does not cease to exist. However, in both cases, given the specificity of such situations and the small number of people concerned (the populations of small island States, in particular, only amount to tens of thousands, rarely hundreds of thousands), one may question the value of any abstract legal protection regime, rather than ad hoc political resettlement agreements.

More fundamentally, instead of looking at climate change as the cause of migration, a more coherent endeavour would consist of protecting migrants who share the same type of vulnerability. Alexander Betts has formulated a proposal to this effect, involving the meeting of protection needs relating to ‘survival migration’, which is a broad concept that may also extend, for instance, to those displaced because of extreme economic deprivation or violence, on the sole condition that migration appears necessary for the survival of individuals concerned.41 A similar approach, but extended to internal migration, has been developed, though nonetheless also at a line between

Yet, political ‘survival’ or ‘climate’ migration goes beyond a group-specific protection from a medium-term perspective. It is a more realistic framework for this incremental approach to future migrants, or of that it is more likely to occur.

In a pessimistic scenario, contribute to a critical mass, it would be difficult to avoid a situation where environmental migration could become chronic in many countries without a medium-term perspective. It is difficult to assess whether it is in the interest of the States to contribute to a situation in which many countries would be affected by environmental migration and States would stop addressing the needs of those people. In other words, there is a need to define categories of migrants on the basis of their rights of migrants.

Alternatively, the protection of ‘climate’ migrants would be a form of protection of all migrants. It would be an ad hoc protection for the ad hoc protection of environmental migrants. At the same time, it would contribute to a medium-term perspective on migration and link that perspective to a social anomaly in the globalised world.

There is no need to decide whether climate change is likely to lead to more migration. Whether or not the protection of environmental migrants is the right approach is another question. It is hard to see how it will be resolved without a change in perspective.
developed through the concept of ‘crisis migration’.

Broader perspectives would nonetheless protect the human rights of all migrants, without attempting to draw a line between migrants ‘deserving’ or ‘undeserving’ specific protection.

Yet, politically, these proposals face significant resistance. While protecting all ‘survival’ or ‘crisis migrants’ would require a paradigm change in international migration governance, incremental changes in the existing paradigm could allow a group-specific protection of environmental or ‘climate’ migrants. In other words, from a medium-term perspective, protecting environmental or ‘climate’ migrants is a more realistic project. One should, however, wonder whether, in the long term, this incremental change would facilitate a structural change – a protection of all migrants, or of all individuals affected by environmental phenomena – or whether it is more likely to delay much-needed structural changes.

In a pessimistic hypothesis, the debate on environmental migration may contribute to a hardening of the positions on migration and create an additional hurdle to the protection of other migrants. Accordingly, alarmist talk focusing on the security consequences of mass migration in the context of environmental change could exacerbate concerns about migration and general xenophobia in many countries, thus preventing the successful integration of migrants. Because it is difficult to attribute an individual decision to migrate to an environmental factor in isolation from social, political, economic, cultural and demographic dynamics, States would probably adopt a very narrow definition of environmental or, a fortiori, ‘climate’ migrants, protection of these migrants is likely to be the exception that proves the rule – a legal development that would perpetuate the dichotomy between those migrants who ‘deserve’ international protection, and the rest. In other words, there is a significant risk that the specific protection of certain narrow categories of migrants may eclipse the application of the protection of the human rights of migrants in general.

Alternatively, an optimistic scenario is that the protection of environmental or ‘climate’ migrants would constitute a first step towards a more systemic protection of all migrants. At best, it would trigger a progressive extension of mechanisms for the ad hoc protection of certain categories of forced migrants (refugees as well as environmental or ‘climate’ migrants) to all migrants, regardless of the cause of migration. At least, recognising environmental or ‘climate’ migrants could contribute to a renewal of currently entrenched political debates on the role of migration and migrants in our societies, where migration is still too often seen as a social anomaly rather than a normal phenomenon occurring in any human society.

There is no clear ground to think that either scenario is more likely to materialise. However, in terms of research and advocacy, a better understanding not only of the opportunities but also of the risks associated with a group-specific protection of environmental or ‘climate’ migrants is required. While arguments

on the protection of these migrants may play a useful role in raising awareness of larger causes, they must be advanced carefully. Arguments based on the fears of an invasion of ‘climate refugees’, in particular, are unlikely to contribute to emancipatory causes.

**Conclusion**

Environmental or ‘climate’ migrants are naturally human beings protected by general instruments such as the UDHR, the ICESCR and the ICCPR. Some of them may also, to a certain extent, be covered by existing group-specific protection mechanisms, in particular as migrant workers and IDPs. Proposals have recently emerged for a group-specific protection. Yet, when approaching such proposals, one needs to ask how group-specific protection would impact the protection of other migrants and of those who, being affected by adverse environmental phenomena, are unable to adapt or cope through migration.

Every migrant and every person affected by environmental phenomena — and, in fact, every human being — deserves his or her rights to be protected. Human rights concerns raised in relation to migration intensify public scrutiny of existing tensions and contradictions between the international management of migration and the international human rights movement, shedding new light on questions that have been evaded for too long. This debate is an opportunity to raise awareness and to demand the advancement of the protection of the human rights of migrants more generally, via a reconsideration of the role of migration in all human societies. In this context, group-specific protection of environmental or ‘climate’ migrants runs the risk of being only a palliative measure delaying much-needed responses to structural deficiencies of the international governance of migration.

11 Basic concepts in international human rights

**Introduction**

Originally, human rights law and philosophy focused on the rights of the individual person, rather than on human activity and the impact on rights of the natural environment. Although the concept of human rights has been expanded significantly to include increasingly fundamental and complex issues, such as the right to a healthy environment, the rights of migrating persons, and the protection of the rights of indigenous groups, the impact of human activity on rights and environment remains unaddressed. There is a general lack of research on the ways in which human rights and development link to climate change.

Against this backdrop, the present chapter seeks to examine the human rights aspects of climate change and to assess the extent to which human rights have been considered in international efforts to address climate change. The chapter begins by offering an overview of the human rights aspects of climate change and the role of human rights in international environmental governance. It then focuses on the impact of climate change on human rights, with particular emphasis on the rights of affected populations, such as indigenous peoples, and vulnerable groups, such as children and women.


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