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Environmental and Juridical Disasters: A Legal Analysis of (Inter)National Protection of Environmental Refugees

Climate change is one of the most devastating catastrophes of our time. The uncertain and constantly erupting symptoms of a degrading environment require the discipline of law to both be able to navigate the changes in the natural world and in the human relationship with it. The effects of environmental degradation and disaster are forcing millions of people across the globe to leave their homes, exposing new manifestations of internal displacement and cross-border forced migration. Environmental protection, and its various facets, is also one of the most complicated areas of international law and reveals underlying juridical tensions.

The aim of this paper is to provide a legal analysis of the applicability of international human rights and refugee law in providing protection for environmental refugees and orientate the ways in which New Zealand jurisprudence proved useful in this regard. In order to achieve this, the paper will be divided into five sections. The first section will consider the general legal challenges of bringing the environment into the international human rights realm. The second section will discuss the applicability of the 1951 Refugee Convention in protecting environmental refugees. The third section will examine New Zealand's national jurisprudence and the conditions required for possible successful refugee claims under the Refugee Convention. The fourth and final sections will concentrate on the AF (Kiribati) and AC (Tuvalu) cases and demonstrate the capacity of existing law to respond to environmental refugee claims.

"Men and nature must work hand in hand. The throwing out of balance of the resources of nature throws out of balance also the lives of men."

-Franklin D. Roosevelt on Jan. 24, 1935

Bringing the Environment into the International Human Rights Realm

Environmental concerns have existed for centuries, nevertheless, it is not until recently that legal mechanisms were established specifically aimed towards collaboratively protecting the environment. For a long time, obligations between nations and regions were based on forms of "good neighborliness" and due diligence through (often unequal) exchanges of interests (Klabbers, 2020). These structural patterns can still be recognized in international environmental law, for instance through procedural notions on information and participation in decision-making processes and the discussions surrounding the functionality of environmental impact assessments, instead of the establishment of hard, immediate and substantive rules regarding environmental protection. The complex relationship between international law and the environment can already be traced back to the 1800's, with one of its earliest case manifestations being the Bering Sea arbitration of 1893. The Bering Sea arbitration marked the beginning of internationally established agreements regarding environmental matters and demonstrated how the Judiciary can function as an instrument to hold governments accountable towards the protection of the environment.

In addition, attempts have been made to set in place more substantive international legal instruments. There have been two significant conferences that marked the emergence of international environmental law. The first one being the United Nations (UN) Conference on the Human Environment in Stockholm in 1972, which led to the adoption of a variety of principles establishing State sovereignty with regards to the environment. For instance, principle 21, which enunciates that States have the *"responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction".* The second significant conference was the UN Conference on Environment and Development in Rio de Janeiro, Brazil, in 1992. The 1992 Rio Conference instituted the concept of sustainable development and aimed to

establish a compromise between nations promoting strict regulation of the environment and nations arguing for more liberal environmental protection, particularly to avert industrial and developmental sacrifices.

Despite the scarcity of effective substantive obligations, there have been successful international legal mechanisms with regards to environmental protection, one being the 1985 Vienna Convention for the Protection of the Ozone Layer. The majority of recent environmental conventions constitute provisions on negotiation, consultation and cooperation, the main challenge however, remains about who should be part of those negotiations, particularly considering the global commonality of the environment (Klabbers, 2020). Discussions regarding this issue led to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The convention sets a variety of procedural obligations for States, and particularly emphasizes the need for States to provide environmental education, recognize environmental associations and groups and the prohibition of penalizing groups or individuals requiring information regarding these issues and to allow the public to participate in discussions and decision-making of environmental issues. Despite the attempt to broaden access to information, there are still limits to the convention, such as that States can still refuse to supply certain information based on privacy, confidentiality, national security and so on.

Presently, there is no general international regime for environmental protection, either in the shape of a general convention or general international organization. Independent legal mechanisms that have been established are programs part of the UN, such as the UN Environmental Program, and legal protection of the environment has therefore only been through sectoral regimes. International environmental law has minimal substantive obligations and instead is mainly based on (often highly institutionalized) procedural obligations. Nevertheless, many of the previously mentioned conventions have established

independent institutional devices and the majority of decision-making processes occur during regular conferences of the parties (COPs) or meetings of the parties (MOPs). Such mechanisms may carry out similar functions as various international institutions and can result in the making of decisions on the basis of consensus, however they do have a restricted mandate and typically lack legal personality under international law, which prevents the establishment of international treaties. Most environmental agreements have arranged compliance procedures, which are fundamental to institutionalizing international environmental law. Nevertheless, such compliance procedures, particularly in the realm of international environmental law, also raise a variety of legal questions, such as relating to attributing responsibility, persecution, compliance, and transboundary harm. The 2015 Paris Agreement has been recognized as legally binding international law, however, lacks enforcement mechanisms which prohibit effective climate litigation. The right to a healthy environment was first recognized by the UN Human Rights Council in 2021 but is still very much an "emerging" international right (UN Human Rights Council, 2021). The right to a satisfactory environment has additionally been recognized in various regional instruments, such as the African Charter on Human and Peoples' Rights (Article 24 of the African Charter) and through "direct constitutional protection" in almost 100 countries (Boyd, 2018:132). Human rights law is still State-based, and most questions therefore revolve around State responsibility, for instance considering the precautionary principle or the 'polluter pays' principle. State failure to prevent pollution may affect other countries and cause transboundary harm. Such questions reflect the root challenges of implementing the environment in present human rights law, including protection of environmental refugees.

Environmental Refugees and the 1951 Refugee Convention

The 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto (Refugee Convention) has been a topic of debate for decades, particularly considering

protection for people that are displaced because of environmental degradation and disaster. Article 1A (2) of the Refugee Convention defines a refugee as *"someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."* (p. 3). The definition emphasizes the need for a well-founded fear of being persecuted on grounds for which the authorities of the home State are unable or unwilling to provide protection. Presently, there are no specific UNHCR guidelines on refugee protection in cases of environmental disaster or degradation (UNHCR, Summary Deliberations on Climate Change, n. 24). Some courts and scholars argue that the Refugee Convention is insufficient and thereby inapplicable in this case (Weerasinghe, 2020). Such argumentation is mainly based on concerns regarding the threshold of harm and to what extent it would amount to persecution, the challenge of identifying which acts count as discriminatory and how they relate to the five mentioned grounds of persecution in the Refugee Convention. In addition, appointing the "persecutor", particularly in the case of industrialized States who could also be responsible for providing international protection in this situation. Another challenge concerns general conceptualization of environmental disasters and effects of climate change as natural and therefore indiscriminate, rather than causing discriminate harm. Since the effects of climate change and environmental disaster do not discriminate, the Refugee Convention has rarely been applied in this context. Discrimination is a key aspect of the definition of a refugee and if State action is oppressive or discriminatory towards specific groups, in cases related to environmental degradation, the framework of the Refugee Convention can still apply. It is however in cases where the lack of human agency is not so clear, that a discussion on this topic raises various complex epistemological and doctrinal challenges.

Nevertheless, McAdams (2016) argues that; "*[t]here is nothing implicit in the Refugee Convention that would preclude recognition of environmental harms amounting to persecution provided that the requisite elements of Article 1A (2) could be established."* (McAdams, 2016:44). In consonance with McAdams (2016), there are approaches that could result in successful refugee claims within this context. Firstly, jurisdictions that apply the predicament approach consider the reasons for why certain groups of people are at the risk of being persecuted, rather than the intention of the "persecutor" to cause serious harm. The predicament approach emphasizes that the harm that some people experience (risk of persecution), such as environmental damage, are a direct result of discrimination, for instance by the framework of the Refugee Convention. The predicament approach is in line with the idea that the proof of the intent of the persecutor is not a necessary requirement to prove persecution under the Refugee Convention. The burden of proof in the case of persecution has been renounced, as was mentioned in the UNHCR's Guidelines on International Protection; *"[t]here is no need for the persecutor to have a punitive intent to establish the causal link. The focus is on the reasons for the applicant's feared predicament within the overall context of the case, and how he or she would experience the harm rather than on the mind-set of the perpetrator."* (UNHCR, 2012: para. 39).

Secondly, a different approach that has remained of great significance in judicial decision-making, is the hazard paradigm. The hazard paradigm is grounded in the idea that natural disasters and environmental damage appear to be nobody's fault since the environment is a global common and thereby, no one can really take responsibility for the consequences, including human rights violations, that result from these disasters. Scott (2020) also proposes a different perspective and argues that "natural" disasters and processes of environmental degradation are often accelerated by human activity and reactivity (Scott, 2020). Scott (2020) proposes the "social paradigm", which emphasizes people's vulnerability

and exposure to natural disasters. Following this approach, human rights violations because of natural disasters, that in traditional jurisprudence would appear to be "nobody's fault", constitute a contributing cause to discrimination in such cases.

Furthermore, there have also been various reconsiderations of the human-rights based interpretation of the refugee definition. For instance, Scott (2020) argues that *"being persecuted in the context of the refugee convention entails a condition of coexistence in which discrimination is a contributory cause of serious denials of human rights demonstrative of a failure of state protection."*. Article 1A (2) of the Refugee Convention requires a well-founded fear of "being persecuted" and thereby reflects the conditions or situational circumstances rather than the intention of the persecutor. The description of persecution as a 'condition of coexistence' acknowledges the systemic natural and temporal scope of the concept of persecution, and the introduction of the term 'denial' (compared to violation), demonstrates the dismissal of the human-rights approach in this case. The failure of States to protect their citizens is still largely based on the legal interpretation of persecution under the Refugee Convention and thereby of great significance in the receiving of refugee protection for environmental refugees.

Reconsidering the Refugee Convention based on environment related human rights violations, resulting from the combination of human vulnerability and hazard, enlarges the amount of people that can be protected by international law. Moreover, the claim of persecution as a 'condition of coexistence' could embrace other forms of discrimination as well and thereby broaden access to international protection in cases of environmental degeneration and disaster.

New Zealand Jurisprudence

The majority of environmental refugees, worldwide, are internally displaced, in which case the State carries the responsibility to protect, promote and realize the human rights of the environmental refugees within their territorial borders without discrimination. In case a State fails to protect the human rights of its citizens, or the effects of environmental degradation are so severe that people have to cross borders, environmental refugees may seek international protection, including within international human rights or refugee law. Jurisprudence and scholarly commentary on applying the Refugee Convention in the context of environmental degradation mainly revolved around State action, or the lack thereof, during or after environmental disasters and towards a specific population group on discriminatory grounds. The intricate relationship between environmental damage and human rights is increasingly recognized in law. In 2013, New Zealand started to break down the legal protection framework on claims based on the impacts of climate change. Even though no one has been granted protection on this basis yet, New Zealand's jurisprudence presently represents the most comprehensive examination on the protection of environmental refugees. Through the 2013 AF (Kiribati) and 2014 AC (Tuvalu) cases, New Zealand's Immigration and Protection Tribunal marked the first legal recognition of 'climate change refugees'.

> *[B]road generalizations about natural disasters and protection regimes mask a more complex reality. The relationship between natural disasters, environmental degradation, and human vulnerability to those disasters and degradation is complex. It is within this complexity that pathways can, in some circumstances, be created into international protection regimes, including Convention-based recognition*'' (AF (Kiribati), n. 379, para. 57).

2013 AF (Kiribati) Case

The 2013 AF (Kiribati) case regards the appeal of Ioane Teitiota against the declining of refugee status and protected person status. Teitiota, a citizen of Kiribati, New Zealand, claimed an entitlement to be recognized as a refugee based on the environmental damages in Kiribati due to climate change, arguing the lives of his family were at risk. The case aimed to determine whether the situation of Teitiota fell under the Refugee Convention or New Zealand's protected person jurisdiction. Teitiota argued for the overpopulation of Kiribati as a result of sea-level rise, causing some of the islands to become uninhabitable which subsequently led to an increase in violence and social tension. In addition to the lack of fresh water and food due to the salinity of the water, which was causing health issues, endangering the lives of the people living on the island and making Kiribati inhabitable within 10 to 15 years.

Despite the devastating climatic effects, the Courts in New Zealand rejected Teitiota's claim for protection on the grounds that the environmental damages did not cause immediate life-threatening harm and the timeframe of the degradation allows for intervention, including the establishment of protection or relocation mechanisms, by the Republic of Kiribati, particularly with support from the international community. The ruling by the court opposed the claim for refugee protection on the basis that Teitiota's personal circumstances and the evidence brought up were not strong enough for refugee protection in this case. However, the committee also stated that the effects of environmental degradation and disaster did lead to a violation of rights and thereby may generate other forms of international responsibility, including the non-refoulement obligations of sending States.

The tribunal recognized that environmental degradation and disaster, because of climate change, could result in the undermining of human rights, particularly when the State fails to protect its citizens aware of the possible risks (AF (Kiribati): para. 6). Nevertheless, despite the harmful consequences of climate change, generally they do not satisfy the

requirements for what constitutes "persecution" according to domestic and international law. Additionally, even if it would have been possible to demonstrate that the effects climate change resulted in persecution, the Refugee Convention poses that persecution must be based on the discrimination of an individual. New Zealand jurisprudence stated that; *"While in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case".* (AF (Kiribati) [2013] NZIPT 800413, para. 64). Environmental degradation and disaster is mostly indiscriminate (not based on individual characteristics) and therefore, the family from Kiribati were not eligible for refugee protection, since the indiscriminate effects of environmental degradation and disaster could not be directly linked to the factors mentioned in the Convention (AF (Kiribati): para. 56). Additionally, the predicament approach is well established in New Zealand's national jurisprudence, including in this case, New Zealand's Immigration and Protection Tribunal (NZIPT) explicitly affirmed the approach in the context of claims related to "natural disasters and environmental degradation".

The Tribunal stated that in a case where there is a lack of State protection and the factors of the refugee definition are satisfied, refugee protection could be possible. In the body of the Tribunal's predecessor, it states that *"the right to life* (Art. 6 of the ICCPR) *in conjunction with the right to adequate food* (Art. 11 of the ICESCR) *should permit a finding of "being persecuted" where an individual faces a real risk of starvation"* (Refugee Appeal No 74665: para. 89). Indicating that the refugee definition can be satisfied if, for instance, a State were to limit access to adequate food or humanitarian aid in the case of environmental disaster (where access to adequate food is deficient) (AF (Kiribati): para. 58–9). In that case, however, the State would be responsible for causing the harm, rather than the environmental degradation or disaster. Furthermore, the Tribunal stated that refugee claims based on human

rights issues and “secondary” threats may be considered successful in accordance with the Refugee Convention if they are related to displacement and environmental disaster. For example, disability or gender discrimination in providing assistance in cases of environmental disaster. The 2013 AF (Kiribati) case represents a legal tipping point that opens the door for a different approach to the protection of environmental refugees. Even though the judgment is not formally binding, it does highlight the legal obligations of States under international law and may in the future constitute fruitful ground for international human rights obligations.

2014 AC (Tuvalu) Case

The 2014 AC (Tuvalu) case regarded a family who fled from the Pacific Island State of Tuvalu in New Zealand and argued that the effects of climate change impacted their living standard in Tuvalu to such an extent that they should not be forced to return home. The Tuvaluan family, being the appellants of the case, claimed that the environmental conditions are causing danger of being arbitrarily deprived of their lives or to being subjected to cruel treatment if forced to return to Tuvalu. The Tribunal aimed to determine whether the Government of Tuvalu failed to act, within its power, to protect the lives of the Tuvaluan family from the devastating effects of climate change. Originally, the appellant sought refugee protection, however, abandoned their refugee claim based on the findings of the AF (Kiribati) case, and acknowledged that *“there was no basis upon which [they] could be recognized as refugees”* (AC (Tuvalu): para. 45). The reached conclusion was mainly grounded in that the possible harm the family might be exposed to in Tuvalu was not sufficient based on the grounds mentioned in the Refugee Convention.

The Tribunal did, however, distinguish between anthropogenic and natural degradation and disaster, mainly since States cannot fully regulate environmental degradation processes. The Tribunal recognized that natural and anthropogenic disasters could ‘provide a

context in which a claim for recognition as a protected person' might be established (AC (Tuvalu): para. 70) and in accordance with international human rights law, States do have obligations to protect people when their rights, such as the right to life, are infringed upon, in the context of environmental degradation and disaster. In addition, similarly to the AF (Kiribati) case, *"the prohibition on arbitrary deprivation of life must take into account the positive obligation on the State to fulfill the right to life by taking programmatic steps to provide for the basic necessities for life"* (AF (Kiribati): para. 87). Tuvalu is more vulnerable to environmental hazards, such as droughts, sea level rise and hurricanes and Tuvalu's jurisdiction ought to reflect this reality to some extent to be able to protect the people in Tuvalu. The government of Tuvalu thereby does have the obligation and capacity to attempt to minimize the risks associated with such environmental degradation (for instance by establishing "ex-ante disaster risk reduction measures or though ex-post operational responses"), however, attempting to allay the underlying environmental processes that drive such natural disasters would place an "an impossible burden" on the State (AC (Tuvalu): para. 75). The Tribunal thereby acknowledged the impact of environmental degradation and disaster due to climate change on the people of Tuvalu, compared to in New Zealand, however, the applicants were unable to establish sufficient evidence that acts by the government of Tuvalu could create a risk of arbitrary deprivation of their lives and that the government was failing to take action within its power to provide protection from such disasters.

The tribunal eventually permitted the family to stay in New Zealand, not because of the environmental damage in Tuvalu, but instead because of their strong family ties within New Zealand. Interestingly, the final decision was not based on domestic or internal legal obligations, but rather on humanitarian and discretionary reasons. The Tribunal found that the family was not subjected to cruel, inhuman or degrading treatment, exposed to discriminatory

policy measures or that the government of Tuvalu inadequately established positive obligations, both in the present or the risks thereof for the future. This conclusion was quite revolutionary since previously, in cases in New Zealand, to be protected from removal based on cruel, inhuman or degrading treatment, there had to be a "treatment", including an act or omission by the State, rather than for instance pre-existing socio-economic conditions increasing vulnerability to environmental disaster or the inability of States to provide protection in that case. The AC Tuvalu case marked a shift in this line of thinking by recognizing the denial of access to protection and humanitarian aid in cases of environmental degradation and disaster as sufficiently constituting "treatment" within the receiving State and thereby may be protected from removal based on cruel, inhuman or degrading treatment (AC (Tuvalu): paras 84–6, 97). This conclusion was reached in line with section 131 of the New Zealand Immigration Act, which States that before determination, the risk of harm related to possible detention must be assessed and indicating that treatment takes place within the receiving State and does not relate to the act of removal itself (McAdam, 2015).

Conclusively, the final decision was thus not made based on the environmental effects of climate change in Tuvalu, instead the Tribunal argued that the humanitarian conditions were sufficient in granting the family resident visas in New Zealand. and thereby deliberately avoided a final decision on this particular regard. New Zealand citizenship was thus granted for discretionary reasons rather than based on any legal obligations. The final decision does therefore also not carry any precedential weight (in opposition to possible refugees or human rights claims). Even though the final decision was based on humanitarian claims, the Tribunal did accept that 'exposure to the impacts of natural disasters can, in general terms, be a humanitarian circumstance' could make detention on environmental grounds unjust (AD (Tuvalu): para. 27). Additionally, the acknowledgement of the age of the children in the final decision as making them 'inherently more vulnerable to natural disasters and the adverse

impact of climate change' (AD (Tuvalu): para. 25) and the recognition of Tuvalu as particularly vulnerable to the consequences of climate change, were important first steps in how to approach refugee claims within national jurisdiction.

Conclusion

The AF (Kiribati) and AC (Tuvalu) cases in New Zealand demonstrate the attempts that have been made to mitigate climate change degradation and disaster, particularly in relation to environmental refugees. By drawing upon national and international jurisprudence, the cases showcase the capacity of existing law to respond to environmental refugee claims and pinpoint where possible limitations can be found. The Tribunal in principle accepted that environmental degradation could bring about protective obligations for States under human rights law or the Refugee Convention, and particularly emphasized the requirement of closely assessing each individual case.

States have positive obligations to protect certain human rights, such as the right to health and adequate food, which are also applicable with regards to environmental disaster. This can additionally bring about protective obligations, for instance when States refuse to provide humanitarian relief on discriminatory grounds (AC (Tuvalu): paras 91–8). The AF (Kiribati) and AC (Tuvalu) cases in New Zealand indicate that even though the State may not be responsible for causing the threat, it does not excuse States from failing to try to act upon the possible risks it may engender and protect its citizens against the detrimental effects of climate change through legal protection (and/or relocation) mechanisms. If States are unable to commit to their national and international obligations in this regard, they may be required to seek support from other States to prevent any human rights violations of internally displaced persons and international environmental refugees, thereby also reshaping the blueprint of the 'responsibility to protect'. The cases demonstrate the limitations of the

existing international human rights and refugee frameworks to deal with the effects of climate change and indicate that without the humanitarian or migration tracks, possible protection mechanisms for environmental refugees would be extremely limited or non-existent. Environmental cases are one of the most convoluted areas of international law, however, also constitute the areas of international law that have generated highly innovative debate surrounding national and international accountability. Moves are being made to find alternative approaches to international protection of environmental refugees and the AF (Kiribati) and AC (Tuvalu) cases in New Zealand provided a beacon of light in the otherwise largely unnavigable territory of (inter)national protection of environmental refugees.

References

David R. Boyd; *The Global Emergence of Constitutional Environmental Rights*. *Global Environmental Politics* 2018; 18 (4): 132–134.

Islam, M. R., & Bhuiyan, J. H. (Eds.). (2013). An introduction to international refugee law. Martinus Nijhoff.

McAdam, J. (2012). *Climate change, forced migration, and international law*. Oxford University Press.

McAdam et al. (2016), International Law and Sea- Level Rise: Forced Migration and Human Rights, *Fridtjof Nansen Institute*, 378, 44.

Rayfuse, R. G., & Scott, S. V. (2012). *International law in the era of climate change*. Edward Elgar.

Juss, S. S. (Ed.). (2019). *Research handbook on international refugee law* (Ser. Research handbooks in international law series). Edward Elgar Publishing Limited.

Scott, M. (2020). *Climate change, disasters, and the refugee convention* (Ser. Cambridge asylum and migration studies). Cambridge University Press.

Mayer Benoît, & Crépeau François (Eds.). (2017). *Research handbook on climate change, migration and the law* (Ser. Research handbooks in climate law series). Edward Elgar Publishing Limited.

Ivanov, D. V., & Bekyashev, D. K. (2016). *Environmental migration in international law*. Cambridge Scholars Publishing.

UNHCR (2012), Guidelines for International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees' (2012) HCR/GIP/12/09 para 39

Weerasinghe, S. (2020). Refugee Law in a Time of Climate Change, Disaster and Conflict. UNHCR Division of International Protection.

UNHCR (2020), Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters,

Klabbers, J. (2020). International Law. *Cambridge University Press.* 3.

UN High Commissioner for Refugees (UNHCR), Refugee Law in a Time of Climate Change, Disaster and Conflict, January 2020,

Black, R. (2001). Fifty years of refugee studies: From theory to policy. *International migration review*, *35*(1), 57-78.

Zetter. R. (1988). Refugees and Refugee Studies: A Label and an Agenda. *Journal of Refugee Studies*, 1, l-6.