

Jane McAdam

Climate Change, Forced Migration, and International Law

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I. Introduction

Recent years have been marked by a number of devastating natural disasters: the tsunami in Asia, hurricane Katrina in the USA, earthquakes in Pakistan, Iran, Chile, Haiti, Japan, New Zealand and Italy - the list goes on. The natural disasters, coupled with increasing concern for the impact of climate change and the depletion of natural resources, have contributed to the international community placing forced displacement due to environmental factors on its agenda. As a result, a number of issues have been raised by international and non-governmental organisations, scholars and, not the least, by the populations who themselves may be affected by different aspects of climate change and environmental degradation.

In her new book, Jane McAdam¹ provides an exhaustive overview of the myriad of literature and reports in this area. She goes beyond other books on the subject by combining legal analysis with the results of her own empirical fieldwork in Bangladesh, Kiribati and Tuvalu. McAdam's book touches upon a number of important issues: how forced migration relating to climate change can be conceptualised; the relevance of the current protection schemes in providing legal solutions; the possibility of adopting a treaty regulating this category of migrants; and the institutional governance of climate change related movement.

II. Definitions: What's in a Label?

Although the book comprehensively addresses all conceivable angles of the subject matter, some comments can perhaps be made as to the demarcations and approaches adopted. The first matter, which is generally considered to be complex in this field, but also essential, is that of terminology and defining the scope of *ratione personae*. From the outset, McAdam focuses on forced displacement and, while acknowledging the fact that different categories of persons could be forced to move because of environmental disasters or climate, she chooses to use the term 'climate change related' throughout the book, which may cover environmental degradation and sea level rise, but not necessarily natural disasters or other potential scenarios.

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McAdam enumerates a number of fundamental premises that provide the basis for her book, among which, that climate change is only one of the motivations why people decide to move, and that the interconnectedness of environmental, economic, social and political factors makes it impossible to determine whether climate change is the predominant factor. However, by doing so, she makes it clear that her primary focus is on movements caused by climate change, and not on movements caused by natural disasters where the nexus to a sudden onset movement is often clearly detectable.

McAdam concludes that since climate change related movement is manifested in a number of different ways, a one-size-fits-all response is not appropriate. For that reason, the book could perhaps have benefited from a different structure where each scenario and its possible solutions are addressed separately. As it is, all possible scenarios are discussed together under the term 'climate change related movement'.

III. Going to the Core of the Matter

The primary questions raised in discussions in recent years are what are the rights of persons displaced because of environmental factors, and what are the obligations of individual States and the international community to provide protection and assistance? In other words, can an individual claim protection from States other than their State of origin and are such states obliged to assist?

In the book, McAdam states that the existing legal regimes do not provide adequate protection or migration pathways for cross-border movement as a result of climate change. Her point of reference is international refugee law, which encompasses human rights protection based on Article 3 of the European Convention on Human Rights² and the UN Convention Against Torture.³ It can, therefore, be assumed that by 'protection' she means admission to the territory, protection against forced return to a situation where basic rights may be violated, granting of legal status - temporary or permanent - and access to rights in the host country. McAdam notes that as the law stands today, there is very little scope to grant protection to persons forced to move because of environmental or climate factors. She bases this on the two existing instruments codifying the principle of *non-refoulement*.⁴

As mentioned in the book, 'protection' can, however, be interpreted as a much broader concept, depending on the point of view; whether it is viewed as per international humanitarian law, human rights law, refugee law, protection of civilians, human security etc. The definition endorsed by the Inter-Agency Standing Committee is, for instance, that 'protection broadly encompasses activities aimed at obtaining full respect for the rights of all individuals in accordance with international law - international humanitarian, human rights, and refugee law - regardless of their age, gender, social ethnic, national, religious, or other background'.⁵ A human rights perspective would emphasize non-discrimination, the protection of indigenous groups and ethnic, racial and religious minorities, and the right to preserve one's culture etc, which goes beyond just the question of possible admission to another country.

It may be held that in order to adequately address the question of protection of persons displaced due to environmental or climate factors, there may be a need to have a broader view of the contents of protection, its justification and sources. Since the point made in the book is that the impact of climate change for different communities and countries depends on the underlying political, economic and social conditions, there would be scope to link a broad interpretation of protection to the necessity to address vulnerabilities and ensuring capabilities.

The other core problem is that of rights versus obligations. McAdam touches upon the doctrine of State responsibility, environmental law, and principles such as humanitarianism and State co-operation as potential bases for State obligations, but perhaps without taking the different lines of argumentation to their conclusion. Many questions are left open; whether there is an obligation for States to assist victims of natural disasters in general, if assistance and protection really can be separated, whether there is an obligation to assist based on humanitarian principles, and, finally, whether it could be translated into an obligation to admit persons into the territory.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

3 UNGA Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

4 *ibid*; UNGA Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention).

5 Inter-Agency Standing Committee, 'Protection of Internally Displaced Persons: Inter-Agency Standing Committee Policy Paper' (December 1999) 4 <<http://www.unicef.org/emerg/files/IDPPolicy.pdf>> accessed 26 June 2012.

These are issues that could be explored further, bearing in mind that different fields of law have different methodologies and objectives. These areas of law do not necessarily envisage obliging states to infringe on their sovereignty by granting admission based on international protection needs. Also here it is necessary to separate the different types of movement. In the case of environmental degradation and the rise of sea levels, it may be possible to establish state responsibility, but that would not necessarily translate into an obligation to legalise cross-border movement.

In the case of sudden onset movements because of natural disasters, the recognition of international protection is easier to establish coupled with an implicit duty to assist on the basis of principles of humanitarian considerations and international co-operation. This duty could stretch as far as creating an obligation *erga omnes*, as defined by the International Court of Justice in the *Barcelona Traction case*.⁶ Over time, many other categories of persons have been considered to be in need of international protection, initially on the basis of compelling humanitarian needs but, with time, their rights were codified in treaties.

IV. In Search of Solutions

McAdam concludes that international law cannot resolve climate change related displacement. The existing legal instruments in refugee law (including Article 3 of the European Convention on Human Rights as applied to removals, expulsions etc) were adopted as part of a process in which certain categories of persons were identified by the international community as being in need of a certain type of international protection. The instruments were aimed at addressing the situation of these categories of persons and, even though they continue to be interpreted and re-interpreted as 'living documents', they still focus, as they should, on the categories of persons for which they were originally designed.

In the case of persons forced to move because of environmental factors or climate change, the emphasis should perhaps be shifted from trying to identify entitlements according to existing instruments, to establishing their needs and once their needs are recognised, generating rights. The first thing that should be established, therefore, is whether persons are considered by the international community as being in need of international protection, and secondly, what kind of protection they need. Thirdly, new responses ensuring their rights should be designed that are suitable for persons in these situations, instead of relying on instruments designed to protect other categories of persons.

McAdam summarises the discussions on the potential adoption of a convention on movement due to climate change or environmental factors. However, she rejects the idea of a treaty on the following grounds: (i) that it is difficult to identify displacement because of climate change; (ii) it would prioritise persons moving due to these factors over other migrants; (iii) there would be a need for individual status determination(s); and (iv) the lack of political will. Even if one agrees that the adoption of a treaty is not necessarily the solution to the problem, these arguments seem somewhat weak. The first objection is that there is no reason why there should be one comprehensive treaty addressing all possible forms of movement due to environmental factors or climate change, but again, that different scenarios may require different solutions. For example, for victims of natural disasters who are easily identified, it may be useful to have an instrument confirming international solidarity and proposing burden-sharing arrangements, while for other categories this may not be the appropriate approach.

Secondly, fear of favouritism hardly seems to be a valid argument against codification of rights. Once a certain category of persons' need for protection has been identified and there is consensus within the international community that there is an obligation to assist based on humanitarian considerations, prevention of human rights violations or any other basis, that group's needs can and should be addressed. There should not be competition between different categories of persons who are entitled to international protection. Thirdly, the argument regarding the requirement of individual determination is premised on refugee law and the assumption that the solution would be individual residency permits. In the case of victims of natural disasters, for instance, there may not be a need for individual determination apart from establishing nationality, as they will have common needs and basis for requiring protection.

Finally, the lack of political will is not only an argument against a treaty but against all aspects of granting international protection to persons forced to move due to environmental factors or climate change. Political will is needed to confirm that this is a category of persons worthy of international protection, that states agree to burden-sharing, and that they will allow affected persons admission into their territory and regulate their stay through residency permits. Law-making in international law often goes through stages where soft law documents such as UN resolutions, Council of Europe recommendations,

6 *Case Concerning the Barcelona Traction, Light & Power Company, Limited (Second Phase) (Belgium v Spain)* [1970] ICJ Rep. 3.

declarations and guidelines by various UN agencies etc, are adopted which create and confirm norms until consensus is reached on a certain matter, perhaps resulting in a treaty. It seems logical that this could also be the process in the case of climate change related migration.

The adoption of guiding principles, such as those on Internal Displacement⁷, would undoubtedly be a useful tool in addressing certain aspects and categories of persons forced to move due to the environment and climate change. It is, however, doubtful that such guiding principles would be able bridge the gap between international law and general principles, such as solidarity and humanitarianism, and the actual implementation of protective measures. Implementation of such measures would require the support of national legal systems, for example through the introduction of residency permits and relocation schemes. A more realistic approach is perhaps that regional arrangements are created on a case-by-case basis, which may in time create customary law where practice is confirmed by *opinio juris*.

To conclude, McAdam's book is timely and thought-provoking. Students, professors, professionals and experts in migration law and climate change will find that the book comprehensively covers the field. However, the problem of environmental and climate change related migration is far from resolved. There are still many aspects that can, and should, be discussed and analysed in order to bring about adequate protection for migrants due to environmental disasters or climate change. ■

⁷ UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr Francis M Deng; submitted pursuant to Commission Resolution 1997/39 Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.2.