

Draft Convention on the International Status of
Environmentally-Displaced Persons

By Michel Prieur¹

Ecological disasters are, at their foremost, human disasters which also affect the environment. Sudden and immediate impacts as well as those more gradual or long term affect both humans and the environment, tragically confirming that humanity and the environment are “inseparable,” as stated in the Rio Declaration, or “indissociable” as stated in the preamble to the March 1, 2005 french Charter of the Environment.

If the effects of disasters on the environment are issues of environmental law, the effects on humans belong to human rights law, with the particularity that they concern both classic human rights and the new human rights to the environment recognized both at international level and in many national constitutions and laws.

An ecological disaster brings the irreversibility of death, as well as physical injury and destruction of property. Victims usually must flee whether they wish to or not. After a factory explosion, flooding or a tsunami, the only choice is evacuation and therefore the forced departure from one’s home. It is impossible to remain alongside the AZF factory in Toulouse nor in New Orleans after Katrina’s passing, nor in Port-au-Prince after the Haitian earthquake of January 12, 2010. Departure is inevitable. The result is a new type of widespread population displacement, not caused by war, as in Poland and Germany in 1945, nor by civil war, as in the Congo, but by the violent effects of a disaster, whether natural (including climate change) or accidental, as with Bhopal or Chernobyl. The flight of environmental displaced persons is a manifestation of their fundamental right to life, expressed as the right to survive by fleeing.

The initiative to elaborate a draft convention which expresses the rights of persons fleeing a disaster began as a research project initiated by members of CRIDEAU who specialize in environmental law (in particular Jean-Marc Lavieille) They were joined by other researchers at the faculty of law and economics of Limoges who specialize in human rights, under the direction of Professor Jean-Pierre Marguenaud of the research center on human rights of the OMIJ. This scientific initiative at the university, spontaneous and not under outside direction, demonstrates that it is possible to innovate without constituting a large CNRS-sponsored project. A 2005 colloquium at Limoges on “ecological refugees” resulted in proceedings published in the *Revue europeenne de droit de*

¹ With the kindful translation by professor Dinah Shelton, George Washington University law school

l'environnement no. 4 (2006). The colloquium launched and reiterated afterwards its call for elaboration of a specific international convention to fill the legal void that was found to exist. A group of researchers was constituted in 2007 and, after eight working days, they submitted a first draft in November 2008 to a group of legal, scientific and philosophical experts working for international and regional organizations and NGOs. The final text was published in the *Revue europeenne de droit de l'environnement* No.4 of 2008 and transmitted widely to governments, international organizations and NGOs. The draft convention can be found on the Internet at www.cidce.org in French, English and Spanish, thanks to the translations prepared in English by Dinah Shelton, Manatt/Ahn Professor of Law at the George Washington University Law School (USA) and member of the Inter-American Commission on Human Rights, and in Spanish by Jose Juste, law professor at the University of Valencia (Spain). They are hereby again warmly thanked.²

Two questions require consideration: Why is a convention necessary? What is the new legal status attributed to the environmentally displaced?

Is a New Convention Necessary?

The international society concerned with environmental law is not particularly favorable to a new treaty, as certain States consider with some justification that there are too many environmental agreements and they lack coordination. However, the draft convention envisaged is not so much an environmental agreement as it is a human rights convention. This domain is certainly not exhausted, but contains legal gaps on human rights that give rise to an imperative moral necessity to which States must respond. The adoption of recent universal conventions on human rights evidences the possibility of normative development, considering the Convention on the Rights of the Child of 1989, the Convention on the Rights of All Migrant Workers and their Families of 1990 and the Convention relative to the Rights of Persons with Disabilities of 2006.

The need for a new convention rests on the one hand on factual bases and on the other hand on legal rationales. It is not necessary to insist on the factual dimension; it is enough to open the newspaper to read with alarm that the number of ecological disasters is constantly rising and that the automatic consequence is a progression in the number of persons who are victims of these disasters. The resulting new type of forced migration is sometimes directly linked to the effects of climate change, as in the case of Tuvalu. Migration can also result more indirectly from the perverse effects of combating climate change through

² A second version of the draft convention has been written by the Limoges group of researchers in June 2010 available in French at www.cidce.org

reforestation and afforestation, creating refugees who are forced to leave their territory because of the compensation mechanisms set up by the Kyoto Protocol. These new victims recall the situation of indigenous peoples forced to leave their territories under the pretext of creating a national park or nature preserve. The figures presented are impressive. According to the report of Nicolas Stern, there will be 150 to 200 million displaced persons due to climate change in 2050. Recent reports announced that 20 to 30 million persons are victims of ecological disasters each year. The High Commission on Refugees estimates that each centimeter rise in sea level results in 1 million displaced persons (2008). The crisis of this type of displaced person is thus already present and projected to become worse in the future. As is often true in case of disaster, the most vulnerable persons are those most exposed. Africa, which represents 10 percent of the global population, has one-quarter of the environmentally displaced. The fear of northern countries to have to accept new waves of migrants is not justified because 80 percent of the displaced are welcomed in countries of the south and constitute in large part internally-displaced persons. The others are victims of disasters in the north displaced in the north. In each case, it is a question of forced or unwelcome migrations and not of voluntary migration resulting from political or economic situations. It should be recognized therefore as the High Commissioner for Refugees underlined, that there is a shadowy zone in which “in the same region, a population can be fleeing either a conflict or a drought, as in Afghanistan” rendering artificial a distinction between the refugee and the displaced.

The gap in law identified by press articles and by numerous authors creates a true appeal to law in the face of such disasters. Some seek recourse in the Refugee Convention of July 28, 1951 (Geneva). But this instrument is completely inadequate. First for historical reasons, it responds to the post-war context when ecological catastrophes were not on the agenda even if there had already been natural disasters. Above all, there are insurmountable legal barriers to invoking this agreement. The environment does not appear as a cause of migration and art. 1 requires that the person claiming refugee status be the victim of “persecution.” It is exceptionally difficult to assimilate natural disasters to a new form of persecution, even if some have made the effort to do so. The procedural guide of the High Commissioner for Refugees itself excludes natural disasters as a basis for claiming refugee status (Guide, 201, para. 39).

The option of amending the Geneva Convention to extend refugee status to environmentally-displaced persons seems unwarranted for political and legal reasons. Opening new negotiations on “refugees” in the context of a current crisis could present a large risk to the convention itself. The High Commissioner for Refugees Antonio Guterres expressed it thus: “in the current context marked by

emotional debates on migrations, reopening the convention would risk weakening it.” On the legal level as well, the Geneva Convention appears poorly constructed for it is aimed at persons and not at groups or others who might be recognized as having collective rights, and moreover it concerns only those who cross a national boundary, while a large number of environmentally-displaced persons remain within their country. For all of these reasons the draft convention elaborated at Limoges attributes to victims of ecological disasters the name “displaced” and not of “refugees” in order to distinguish the two cases of migration which have different causes and different consequences. It is thus necessary to have a legal status adapted to their specific situation in space and in time. When the High Commissioner for Refugees declares that “the distinction between refugees and displaced is outmoded” he is speaking of facts and the necessity of international solidarity which arises in the two cases, but that does not at all prejudice the difference in legal status which requires an appropriate vocabulary. In reality he has in mind those situations where it is difficult to distinguish economic causes from ecological causes of displacement of populations in southern countries.

Beyond the call for law and the appeal to conscience in favor of these new migrants, a new convention has serious legal justification. One can rely upon both existing conventions and on “soft law” texts that approach customary law. International conventions on human rights aim at universality in space and time. Even if they do not speak in particular to times of disaster, they have a vocation to be applied in all circumstances. No conventional human rights text excludes a period of disaster from its scope of temporal application. The only convention in force which confirms explicitly its application in situations of risk and humanitarian emergency, including natural disasters, is the 2006 Convention on the Rights of Persons with Disabilities (art. 11). For others, their temporal applicability in case of disaster is implicit. This interpretation can be given to the 1966 UN Covenant on Economic, Social and Cultural Rights. It recognizes in its art. 11 the right of each person to food, shelter and clothing. Article 11 was interpreted in 1996 in a General Comment of the Committee on Economic, Social and Cultural Rights as applying to all, including during a period of emergency. It can be seen as the same for all the articles in the two Covenants of 1966, including Article 6 of the Covenant on Civil and Political Rights on the right to life and article 12 on the right to health in the Covenant on Economic, Social and Cultural Rights. The right to life and the right to health are probably those which fall most legitimately within the special legal regime for environmental migrants. The positive obligation to respect the right to life is well understood today as imposing measures of prevention to limit the effects of disasters which pose risks to life. It can be conceived of as a right to survive in case of disaster. It is a matter of organizing the evacuation before the disaster, because evacuation is a condition of survival. It is notable in this regard that if the right to life can be

considered as the principal foundation of rights held by victims of disasters, it is also one of the rights which cannot be subject to derogation by states even in times of exceptional public danger (art. 4(2) of the Covenant on Civil and Political Rights).

There are also numerous “soft law” texts which can serve as a basis for the draft convention. Principle 18 of the 1992 Rio Declaration on Environment and Development is the base for humanitarian action in environmental matters: “States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.” This principle incorporates the essence of General Assembly Resolution 45/100 of 1988 on humanitarian assistance to victims of natural disasters. Also to be cited are the abundant references concerning the international strategy for the reduction of disasters, the declaration of Hyogo of 2005 on the reduction of disasters and the prevention of risks, and the UN General Assembly resolution 62/192 of 2008 containing an international strategy of disaster prevention and resolution 63/127 of 2009 on natural disasters and vulnerability. As for those environmentally displaced persons who do not leave their country (internally displaced), there exists on the international level only directive principles relative to the displacement of persons inside their own country of 1998, of which the UN Human Rights Commission took note April 17, 1998. For Africa a recent convention of October 22, 2009 addresses the protection of and assistance to internally displaced persons in Africa. It will enter into force after 15 instruments of ratification.

To the extent that the question of disasters, after having been addressed in the context of operational assistance and aid, has become a legal preoccupation linked to human rights, it is not surprising that diverse international bodies have proposed a legal instrument concerned with the displaced. The following may be mentioned:

- The UN International Law Commission in Geneva decided in 2007 to inscribe on its work program the subject “the protection of persons in case of disasters” including the question of displaced persons.
- The Parliamentary Assembly of the Council of Europe adopted a report by Madame Acketoft and recommendation 1862(2009) of January 30, 2009, on migrations and displacements caused by environmental factors: a challenge for the twenty-first century. It foresees the elaboration of a convention for the displaced (p.118 of the report, point 6-2 of the recommendation in view of a legal study for the elaboration of a framework convention relative to the status of environmental migrants.)

- The European and Mediterranean agreement on major risks or EUROPA signed in 1987 under the aegis of the Council of Europe put on its agenda in 2009 the preparation of an ethical charter on response to major catastrophes which necessarily will take up the question of environmentally displaced persons.
- The administrative council of the United Nations Environment Programme adopted in February 2009 its fourth program for development and environmental law (or Montevideo IV) in which it proposed to inscribe in its work program a study on the feasibility of a special legal status for environmentally displaced persons. Notably, neither the Council of Europe nor UNEP used the term “refugees” but instead adopted the word “migrant” or “displaced.”

An ad hoc convention thus would appear welcome. The proposal of the University of Limoges is both geographically universal and general in its scope, since it addresses all types of disasters. It is thus distinct from other academic suggestions which look only to those affected by climate change. All environmental risks, whether of a natural origin or anthropogenic are susceptible of leading to population displacement. The fundamental rights of persons displaced poses unique problems of human rights in a period of crisis; the origin of the crisis is immaterial.

The opinion of an official authority in the matter permits some hope that the text will be submitted to States. During an interview, the High Commissioner for Refugees declared: “I lobby for the creation of a legal instrument and protection mechanisms that are more flexible than the 1951 convention, but which imposed obligations on states, like a convention of temporary protection.”³

For a conventional legal status for environmental displaced persons

The draft convention institutes new rights, a specific status and implementation mechanisms.

The new rights are in reality inspired by rights recognized for refugees with the difference that here these new rights apply both to externally displaced (those who cross borders) and internally displaced (who are displaced in their own country, which in a large federal state can amount to a veritable exile). Besides these specific rights linked to the displacement, other rights guaranteed are classic human rights, simply recalled here to emphasize that they are not suspended in time of crisis.

³ A. Guterres, Le Monde, December 16, 2009

The general objective of the draft convention is to guarantee these rights for environmentally displaced persons who currently do not fall in any category of protected persons (art. 1 of the draft convention). They are not refugees, even if they cross a border, but they are ordinary citizens who are displaced within their own country or in another. In the two instances, their vulnerability comes from the fact that the disaster exposes them particularly to the risk of non-recognition of their essential rights because of the legal void that applies to them at present.

The principal innovation of the convention concerns the right of environmentally displaced persons to the free choice of the region or receiving country. In the disorder that accompanies the social disorganization, victims should be able to conserve their free choice of residence, either in their own country, or in another. The desire to return to a parent or friend who lives elsewhere, even abroad, should allow a family or friends to reassemble without administrative obstacles (art. 1er). This principle of free choice of place does not prejudge, initially, the temporary or permanent character of the displacement. It rests on the right to liberty and freedom of movement and includes the right to leave any country and to return to one's own (art. 9 and 12 of the Covenant on Civil and Political Rights). This right is affected by the principle of proximity which leads those displaced to remain as close as possible to their place of origin (art. 4-2 of the draft). This right is attributed not only to individuals but also to families and to groups of people as defined in art. 2-2-1 of the draft. The originality of the Convention is here to recognize both individual and collective rights in the spirit of the Covenant on Civil and Political Rights (art. 1 and 23). The specific rights of families and populations are treated in art. 8 of the draft convention.

The free choice of the receiving country can only be exercised on condition that states have an obligation to receive the displaced. This is why there is imposed a duty to accept environmentally displaced persons (art. 1-2 of the draft). This obligation is founded on the principle of solidarity which dominates public international law and in particular environmental law (principle 27 of the 1992 Rio Declaration): States should cooperate in a spirit of solidarity (art. 1, al. 1 of the draft). It rests also on the principle of common but differentiated responsibilities foreseen in art. 4-1 of the draft convention which solidifies international solidarity in particular as concerns the causes of climate change. The obligation to receive should also be fulfilled in ways which do not undermine the principle of non-discrimination, in posing restrictive conditions on entry which limit the free choice for reasons based on sex, language, color, age, etc (art. 10 of the draft).

Thus benefiting from the right of free choice and place of entry, the environmentally displaced should equally benefit from all the classic human rights without the disaster serving as a pretext for derogation. The rights of the

environmentally displaced apply in all hypothesis of displacement both inter-state and intra-state, to displacements that are temporary as well as those that are permanent. The draft proposes a definition of displaced in response to the concerns of international authorities concerned with refugees, a definition that underlines the reasons for the movement. According to art. 2-2 of the draft, environmentally displaced persons are “ individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence and requires their relocation and resettlement”.

Internationally recognized economic, social and cultural rights should apply without restrictions to the environmentally displaced as a new category of subjects of law, whether they are internally or externally displaced. This is why the draft convention enumerates the fundamental rights which in particular should be preserved in their situation of distress. The fundamental rights in question are detailed in distinguishing the common rights of all displaced, the rights of those temporarily displaced and the rights of those permanently displaced. As concerns the first, it is a matter of the right to information and participation concerning the threat of disaster and the preventive measures which states should take. Of course, before the disaster the future victims are not yet displaced. Nonetheless, they should have been directly associated to public prevention policies put in place, in their quality as potential victims. Article 5 of the draft also contains the right to receive assistance, the right to water and to food assistance, the right to shelter, the right to care, the right to juridical personality, the right to respect for the family, the right to education and training and the right to work. As for the rights of the temporarily displaced, article 6 of the draft guarantees the right to a secure lodging, the right to return, and the right to prolonged stay. As for those permanently displaced, article 7 of the draft includes the right to rehousing and the right to a nationality.

To ensure that all environmentally displaced can benefit from these special rights, the draft convention institutes a special legal status for the displaced. Article 9 of the draft requires states to put in place in their domestic law procedures to recognized the status of environmental displaced person. This special status rests on the definition in article 2 of the draft and on guidelines directed at the states parties and elaborated by the High Authority, an independent organ designated by the conference of the parties. The convention requires a national special commission to attribute the status of environmentally displaced (art. 12). There is also foreseen an independent commission named not by the government, but by the highest juridical authorities of the country concerned. The national commission decides to grant or refuse the status to persons or groups of

people, according to the criteria which are set forth in the international guidelines. These decisions should be subject to judicial review, then an international appeal before the High Authority, either by those seeking the status and/or an NGO (art. 11-3-b).

To guarantee the effectiveness of this special status of environmentally displaced and to ensure that the convention is not simply a piece of paper, art. 4 regarding principles institutes a principle of effectiveness by establishing a global agency for environmentally displaced persons and a principle of proportionality aimed at implementing an international system of financial aid to assist the beneficiaries of the status of displaced. Reasonable people could consider that the draft convention foresees too heavy an institutional machinery, which risks becoming a pretext for non-adherence by states. We think to the contrary that the reality and the will to concretely implement the convention requires establishing the legal status of environmentally displaced and the institutions to ensure it.

Thus, the convention envisages in article 11 the creation of a special agency charged with displacement: World Agency for environmentally-displaced persons, to accompany the High Authority already cited and the World Fund to finance the receiving and return of displaced persons on the base of a special tax like the international carbon tax, tax on financial products or on international trade. The modalities of creation and functioning of these institutions should be the object of special protocols elaborated in the year following the opening for signature. The Parties also engaged to adopt another protocol relative to the responsibility of private and public actors concerning preventive duties and reparation if they are directly or indirectly responsible for the conditions leading to environmental displacement (art. 4 al. 2 of the draft). It is clear that international negotiations to come risk being polarized as much on the institutional as on the material aspects of the agreement. Thus all the formulas are flexible. It is clear that if the High Commissioner for Refugees were to offer to enlarge the scope of competence towards the environmentally displaced, that could only facilitate the adoption of the convention. It would require a double condition, however: finding a specific source of financing and an ad hoc authority charged with the functions envisaged by the proposed High Authority. There is no effective protection for human rights without mechanisms of collective international guarantee permitting individual recourse.

Whatever the responses to come concerning the progress of the Convention on Climate Change and reform of the Kyoto Protocol, the multiplicity of ecological disasters continues to engender a growth in the number of environmentally-displaced persons, especially in the south, but also in the north. It is thus certain that a new category of victims of damage not directly imputable to a state arises. These victims should not also be victims of human rights

violations. This is why a new global recognition of a human right to a safe environment should undoubtedly accompany a new universal recognition of the human rights of environmental victims.

The draft convention on environmental displaced persons is not an abstract utopia. It is a concrete response to a concrete reality which pushes us urgently to call loudly and strongly for respect for human rights even in case of disaster, in the name of universal and effective of human rights and in the name of the solidarity between peoples and nations which imposes our collective responsibility.