



Isabel M. Borges, environmental change, forced displacement and international law: from legal protection gaps to protection solutions

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The impact of involuntary migration on account of climate change has been the focus of a wide range of efforts at the scholarly level in the last decade.¹ The research community has attempted to narrow the ‘legal protection gap’ for persons who are displaced due to environmental change, with a varying degree of success. Isabel Borges’ book is yet another thoughtful attempt aiming to address the fragmented normative regime on this subject.

The impact of climate change has been characterized as the “defining human development issue of our generation.”² It has also been described as arguably “the biggest humanitarian and economic challenge that the developing world will face in the coming decades.” Till very recently, there was uncertainty regarding the fact that climate change was a result of human activity. However, the 2014 IPCC report settled this debate and *clearly* stated the influence of human activity on climate change.³ Even though it is difficult to ascertain the exact degree of its impact, it is widely accepted that it has the potential to cause forced displacement of millions of people. Over the next 50 years, it is expected that the number of people displaced

¹ JANE McADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW (2012); Walter Kälin and Nina Schrepfer, *Protecting people crossing borders in the context of climate change: Normative gaps and possible approaches*, available at: www.unhcr.org/4f33f1729.pdf; Jane McAdam, *Climate change displacement and international law: Complementary protection standards*, available at: www.unhcr.org/4dff16e99.pdf; Roger Zetter, *Protecting environmentally displaced people: Developing the capacity of legal and normative frameworks*, 2011, available at: www.refworld.org/pdfid/4da579792.pdf.

² United Nations Development Programme, *Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World*, at 1.

³ IPCC, *Climate Change 2014: Synthesis Report* (2014).

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due to environmental change would be between 50 and 200 million.⁴ As a result of these alarming projections, several scholars, international organisations and particularly vulnerable states facing imminent threat, have raised concerns about the impact of environmental change on forced displacement. Former U.N. Secretary General described displacement on account of climate change as “the new normal”.⁵

Working within this context, Borges’ book aims to analyse the role of international law in general and in particular human rights law, in the protection of people who are facing a legal protection blackhole in reference to cross-border displacement resulting from climate change.

1 Definitional challenge: What’s new in Borges’ label?

While the issue of forced displacement due to climate change has been brewing since the First Assessment Report of the IPCC, scholars have never been able to settle around a label and clear the definitional ambiguities for those who are displaced by environmental reasons. At the outset, Borges has clarified the label and the definition. In this book, she has used the term- ‘*Environmental Displaced Persons*’ to mean the following:

those individuals of a country who for compelling reasons of sudden disasters...or progressive environmental degradation..., natural and/or human made, impacting in their lives or livelihoods are obliged to leave their country of origin temporarily or permanently to a third state.⁶

While it is not meant to be a legal definition, it serves the functional purpose of highlighting the vulnerability of individuals when their life/livelihood is affected due to environmental reasons. To better understand the wider import of this definition, it is important to locate this definition within existing scholarship on this matter. Several labels such as “climate refugee”, “environmental migrant”, “climate migrant” etc. have been used in the past to refer to those who are displaced due to environmental reasons. The divergence in the use of labels and their meaning is primarily due to the lack of consensus on environmental factors being the root cause of forced displacement. Earlier attempts towards defining the such persons have characterized social, cultural and economic drivers to be the root cause of displacement in addition to environmental drivers.⁷ However, Borges’ definition gives due regard to the environmental factors leading to displacement and hence, highlights the urgency of the problem. In this way, the definition also recognises the poly-centric nature of this problem and avoids the fundamental error in other approaches.

⁴ NORMAN MEYERS & JENNIFER, ENVIRONMENTAL EXODUS: AN EMERGENT CRISIS IN THE GLOBAL ARENA 15-16.

⁵ Barbara Lewis & Alister Doyle, *Extreme Weather Is New Normal U.N.’s Ban Tells Climate Talks*, REUTERS, Dec.4, 2012, <https://www.reuters.com/article/us-climate-talks/extreme-weather-is-new-normal-u-n-s-ban-tells-climate-talks-idUSBRE8B217F20121204>.

⁶ ISABEL M. BORGES, ENVIRONMENTAL CHANGE, FORCED DISPLACEMENT AND INTERNATIONAL LAW: FROM LEGAL PROTECTION GAPS TO PROTECTION SOLUTIONS 5 (2018).

⁷ LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF ECOLOGICAL REFUGEES 320 (2009).

2 Basic premises of the book

Right in the first chapter, Borges has enumerated two fundamental premises for her book. *Firstly*, she aims to take a holistic approach to protection of EDPs-before, during and after displacement. She views protection to be a dynamic guiding concept which does not only include *reactive* measures but also include *proactive* measures. *Secondly*, Borges favours the human rights approach to be the cornerstone of any protection regime for EDPs. With this approach, the book aims to build upon the existing obligations of states regarding protection of EDPs through dynamic and contextual interpretation of the state obligations.

The strength and weakness of this book lies in the second premise itself. It is indeed desirable to undertake a human right approach while realizing the necessity of addressing the ‘protection paradox’ related to EDPs. The book presents a comprehensive study of substantive norms under international human rights framework which can be expansively interpreted to protect people from environmental displacement. However, application of such an approach has resulted into a series of dead-ends. It is pertinent to mention the fate of the Inuit petition before the Inter-American Court of Human Rights (IACHR) in 2007. The petition did not succeed due to the failure of the establishing a direct causal link between human rights violations suffered by the indigenous populations and pollution originating from Canada and USA.

3 Exploring the core of the matter

Recognising the complex nature of challenges with respect to EDPs, Borges has admitted of having run into methodological difficulties. Clearly, the protection challenge for those displaced due to environmental factors can be approached from humanitarian to human rights to environmental to security perspectives. The author has confined the analysis within the human rights framework.

Starting from first principles, the second chapter explains the reasons for emergence of the issue of environmental displacement. This chapter also presents the legal challenges regarding protection of EDPs and guiding themes which need to be considered. Borges highlights the ‘legal protection gap’ for EDPs because the current international protection regime for cross-border displacement does not factor in concerns of those who will cross a border due to environmental reasons. The protection currently doesn’t exist because of the weak causal link between the concept of environmental change and its impact on displacement. Borges has described the normative foundation of her basic premise in this chapter only where she attempts to frame environmental displacement as a human rights issue. So far, the academic discourse around displacement has been focused around specific themes- internal displacement, mass expulsion, development-induced displacement, among others. However, a rights-based approach has not seen the light of the day in the context of environmental displacement. As per the book, rights-based approach is best suited to address the vulnerability of EDPs. Arguing for this approach, Borges brings in foundational principles embedded in international

human rights law such as “minimum standard of treatment” and concern for vulnerability of individuals. In view of these reasons, the author believes that human rights law can provide the normative foundation for the evolving protection regime for EDPs.

Chapter three of the book is predicated on the context provided by the second chapter with regard to human rights obligations of the states under international human rights law and other instruments. Through a series of illustrative examples in the form of state practice and case laws, the author presents a comprehensive set of obligations of home state regarding protection of EDPs which are currently in operation. The inherent argument is environmental change affects the enjoyment of whole range of human rights. Borges further builds on this argument by invoking state obligations to prevent human rights violations. Here, the book also describes the current international law framework which explicitly outlines the recognition of duties of states with respect to protection from displacement. In this chapter, soft-law instruments are a major focus of discussion. The Guiding Principles on Internal Displacement (GPID), developed in 1998, was perhaps the first instrument at the international level which provided the states with guidance on pre- and post-displacement. At the regional level, protection regime for EDPs is much stronger. For instance, there are specific provisions in the Kampala Convention and Peninsula principles obligating the states to take preventive and reactive measures to protect EDPs. Building on the successful efforts at the regional level, the governments of Switzerland and Norway launched the Nansen Initiative to build consensus amongst states regarding the legal, institutional and operational challenges regarding environmental displacement. Borges has described the import of each of these instruments in detail with a view to address the fragmented regime around EDPs.

In the next chapter, the author wrestles with the formidable challenges for protection of EDPs under the international refugee law framework. For EDPs to claim protection under the Convention on Status of Refugees, it is important to meet the threshold of each of the elements as identified in the Convention. It is impossible to qualify environmental harm as a form of persecution except in cases where states have undertaken prejudicial actions.⁸

The most innovative element of the book is located in the fifth chapter which aims to emulate a protection regime for EDPs on the lines of European Union’s regionally oriented complementary protection framework. Borges proposes ‘labour migration’⁹ as a vital protection strategy for avoiding displacement and as a measure to adapt to changing environmental conditions. In addition to labour migration, the author also advocates for a ‘formalized system of complementary protection’¹⁰ in case of cross-border

⁸ Office of the United Nations High Commissioner for Human Rights, *Submission of Maldives* (September 25, 2008),

https://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf

⁹ Council of European Union Directive, *Seasonal Workers Directive 2014/36/EU*,

https://ec.europa.eu/anti-trafficking/eu-legislation/seasonal-workers-directive-201436eu_en

¹⁰ Council of European Union Directive, *On minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF>

displacement. Essentially, this chapter argues for a regionally oriented framework to deal with environmental displacement.

The concluding chapter wraps up the analysis on a positive note hoping that the interaction of regional and international instruments would result in a holistic protection framework for EDPs. Borges has presented a formidable case for a future protection regime adopting a right-based approach and one which is oriented on the same lines as the European Union's framework. It should be noted here that while arguing for human rights approach, the author discounts the limitation of human rights law when it comes to relationship between states and groups, if the state doesn't have spatial or personal connection.¹¹ Without establishing an individualized connection, the protection under international human rights law can only be seen in a limited sense. Another major flaw in this approach is regarding the 'burden-sharing' aspect amongst receiving states. To ensure a just 'burden-sharing' regime, it is important to look beyond the international human rights law while contemplating any protection regime for EDPs.

4 The global migration compact: a ray of hope for Borges' EDPs

The central concern of this book is holistic protection regime for EDPs. After the Nansen Initiative Protection Agenda¹², climate negotiators have slowly become alive towards the need of looking at this issue in a comprehensive manner. The Global Compact for Safe, Orderly and Regular Migration (Migration Compact) has gone a step further in this direction by explicitly acknowledging the direct nexus between environmental change and migration.¹³ It seems that with the recent developments like the 2016 New York Declaration for Refugees and Migration and the Migration Compact, the international community has woken up to the reality of environmental displacement.

To conclude, Borges' book is an essential addition to the existing scholarship on the protection of environmentally displaced persons. The book offers an innovative insight into the complex 'legal protection gap' problem while devising a legal protection framework for EDPs. This book would serve as an important text for climate negotiators who are working on the implementation of the Migration compact.

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¹¹ Ralph Wilde, *Triggering state obligations extraterritorially: The spatial test in certain human rights treaties* 40 ISRAEL L. REV. 505.

¹² The Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change : volume I*, available from <https://disasterdisplacement.org/the-platform/our-response>

¹³ Global Compact for Safe, Orderly and Regular Migration, Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, (December 11, 2018), <https://undocs.org/en/A/CONF.231/3>