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Contextualizing environmental migration: the gap between the legal nature of refuge and environment during the age of global warming and natural catastrophes

Contextualizando a migração ambiental: a lacuna entre a natureza jurídica do refúgio e do meio ambiente durante a era do aquecimento global e das catástrofes naturais

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Abstract

Migration has attracted increasing attention and it has been a source of concern from academia to politics for the past couple of decades. While mankind faces its biggest migration crisis since World War II, many discussions arise from the complex and intricate dynamics of refuge, considering that the object of study, both human and mobile, has to flee a given area of residence in order for one to protect him or herself from war, persecution and serious violations of human rights. Given the organicity of the theme, and as encompassing as the current concept of refugee might be, there is a special contingent category of migrants that is not yet encompassed by the current notion of who is eligible for refugee status: those who flee environmental catastrophes. On the verge of multiple natural events – such as the case of Haiti and the 2010 earthquake - and some man-made disasters – such as the Samarco dam collapse in Brazil – how to legally address individuals fleeing naturally devastated areas, facing the gap between the legal nature of the status of refugees in international law and the legal nature of environment, in a century named “The Age of Global Warming”? Considering the perspective on climate change for the coming decades, the reshaping of the concept of refugee status is of vital importance, given the increasing population of environmentally displaced persons - an alarming number that has not yet been addressed by the current legal framework. For the present study, we opted for the deductive-analytic research method, using bibliographic research as technique.

Keywords: refugees; migration; environment; International Law; Environmental Law.

Resumo

A migração tem atraído atenção cada vez maior e tem sido uma fonte de preocupação, desde a academia até a política, nas últimas décadas. Os fluxos migratórios têm ganho maior destaque e sido fonte de preocupação desde a metade desta década. Nesta, que é a maior crise migratória enfrentada pela humanidade desde a Segunda Guerra Mundial, são múltiplos os debates em torno da complexa e intrincada dinâmica do instituto do refúgio, considerando-se que o objeto de estudo, humano e em mobilidade, tem de abandonar sua área de residência habitual, de forma a proteger-se de perseguições, guerra ou graves violações de direitos humanos. Contudo, diante da organicidade do tema, e por mais abrangente que seja a conceituação de quem é refugiado, há uma categoria especial e contingencial de migrantes que ainda não é abarcada pela noção corrente de quem é passível de receber o status de refúgio: aqueles que fogem de catástrofes naturais. Às margens de vários eventos naturais – como é o caso do Haiti e o terremoto de 2010 – e alguns desastres causados pelo homem – como o rompimento da barragem da Samarco no Brasil – como compreender legalmente indivíduos que abandonam áreas ambientalmente devastadas, diante da lacuna entre a natureza jurídica do instituto do refúgio no direito internacional e a do meio ambiente, em um século denominado “A Era do Aquecimento Global”? Considerando as perspectivas sobre mudanças climáticas nas próximas décadas, a remodelação do conceito do status de refugiado

é de vital importância, dada a crescente população de pessoas deslocadas em virtude de catástrofes ambientais - um número alarmante, que ainda não foi abordado pelo atual quadro legal. Para o presente estudo, optamos pelo método analítico dedutivo de pesquisa, utilizando a pesquisa bibliográfica como técnica.

Palavras-chave: *refugiados; meio ambiente; Direito Internacional; Direito Ambiental; migrações.*

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1. Introduction

Almost 70 years after the adoption of the 1951 Convention Relating to the Status of Refugees, and exactly 60 years after the promulgation of the 1967 Protocol on the same subject, the expansion and contextualization of the concept of refuge remains at the very heart of the debates on human displacement and migration. There are categories of forced migrants, however, who do not yet enjoy the breadth of the definition. In this regard, in order to better understand the current legal framework, we need to comprehend the present concept: who is entitled to claim the refugee status?

Taking the broader concept, the one on the Cartagena Declaration of 1984, already devoid of the temporal and geographic limits of the 1951 definition, thus promoting an extension of the concept, it was not until then that, for the purposes of conceptualizing refugee status, the issues regarding massive violations of human rights were considered to be refuge-triggering. Still, a refugee is someone who escapes persecution or who has well-founded fears of abuses of his rights and freedoms, as a result of conflicts and infringement of human rights, and who do not want to or cannot return to his country of origin at the given time.

This considered, mankind is currently experiencing its greatest flow of human displacement in recent history, ever since World War II, with an estimated number of 22.5 million refugees worldwide, more than half of

whom are under 18, and an alarming number of 65.6 million human beings in situations of forced displacement, according to UNHCR (UNHCR, 2013) data.

Similarly, given the considerable freshness of environmental debates - *taking into account the vastness of human history* - we must acknowledge that there is a portion of humans in displacement, not contemplated by the quoted data, that is also affected by the unwillingness to leave its place of origin or birth: the victims of environmental disasters. For these individuals, estimated at 22 million people worldwide in 2013 (IDMC, 2014), the refugee status is not granted.

However, there are theoretical discussions about the legal nature of the refugee status, considered to be an individual right, which would render the connection between it and environmental law incompatible – considering the environmental protection is set under diffuse legal nature, being indeterminate and indivisible (RAMOS, 2011). How, then, to ensure the protection of these individuals without proper legal protection of their status of displacement and without considering that environmental catastrophes, especially those caused by anthropogenic actions, are conducive to forced migration?

In order to proceed with the present study, the research method adopted will be the deductive-analytic method, due to the need to resort to a strategy of downward reasoning, starting from the major premise that people who flee their home of origin owing to situations of imminent and/or constant danger are, indeed, refugees, regardless of what caused the risk, and environmental catastrophes shall be the minor premise for the assessment of refugee status. This taken into account, the chosen research technique is bibliographic research.

2. The legal nature of refugee status

What is taken as the legal nature of individual right of the refugee status is on Article 1 of the 1951 Convention on the Status of Refugees, which states that a refugee is any person who is covered by the concept set forth in its text, a very narrow and specific definition. At the time of the promulgation of the Convention, there were, in addition, temporary and geographical limitations to the legal powers of the United Nations High Commissioner for Refugees, under the acronym UNHCR - which was created

through the UN Resolution n. 428 (V) and which initially would exist for only 3 years (UNHCR, 2011).

This resolution, the result of another text - resolution 319 A (IV), relating to the 4th Session of the General Assembly of the United Nations (UNGA Database, 1949) - promoted a *ratione personae* type of definition, bringing to the recent structures of the United Nations a concept about who the persons to be protected by the new specialized agency would be (JUBILUT, 2007).

Initially, due to a geographical limitation inserted in the text, only refugees who had fled because of World War II would be protected by the aegis of the High Commissioner, bounded by the hope that humanity, after the intensity of the two Great Wars, would no longer be at conflict - an expectation that would later be thwarted by the Korean War¹, which is why the mandate would be extended *ratione temporis* for another 5 years until it became a definitive agency (FISCHEL DE ANDRADE, 2006).

The current concept of refugees on the international scenario would first be set out in a Convention of the Organization of African Unity, in 1969 (UNHCR, 1969), specifically dealing with refugees from African countries and later incorporated into the Cartagena Declaration on Refugees (UNHCR, 1984), which would state that

la definición o concepto de refugiado recomendable para su utilización en la región es aquella que además de contener los elementos de la Convención de 1951 y el Protocolo de 1967, considere también como refugiados a las personas que han huido de sus países porque su vida, seguridad o libertad han sido amenazadas por la violencia generalizada, la agresión extranjera, los conflictos internos, la violación masiva de los derechos humanos u otras circunstancias que hayan perturbado gravemente el orden público.

However, despite being the most encompassing concept, besides from excluding the category of internally displaced persons from conflict, it fails to cover the growing numbers of persons who are involuntarily leaving their

¹ The reference to the Korean War (1950-1953) was made only for contextualisation about the time when UNHCR had its mandate expanded, which does not necessarily mean that other concomitant conflicts did not also serve as an input to the expansion of the said mandate.

places of origin because of natural disasters: the environmentally displaced persons.

A portion of academia defines this group of specific migrants as "*climate exiles*" (BYRAVAN; RAJAN, 2015, p. 21-28), especially those who run the risk of becoming stateless. This is commonly used to refer to those living in coastal areas and islands, at risk of disappearing due to sea level rise. For those, there is still no legal standing under the United Nations legal framework and institutional umbrella.

3. Environmentally displaced persons and the legal nature of the environment

It is estimated that by the year 2013, 22 million people (IDMC, 2014) have fled their home of origin because of climatic conditions that have made it difficult to survive and/or stay on their homeland, during the first decade of the century that is already being called "*The Age of Global Warming*" (FINDLAY, 2011).

Due to environmental processes - induced by humans or not - the tendency is for these numbers to rise in the coming decades, in a consequential way to the elevation of temperatures, due to global warming and other phenomena. One of the most alarming predictions estimates that 200 million human beings will be forced to shift because of changes in the environment by 2050 (KOSER, 2009).

Such a projection, however, does not reveal the complexity and multiplicity of events that would lead to such displacements, nor which countries would be better equipped to support the larger flows. The unpredictability of whether movements will be temporary, permanent, internal or across borders, coming from reversible or irreversible damage, remain - until the present moment - unknown (KOSER, 2009).

There is also resistance on behalf of the countries, because of the impossibility of predicting the migratory flows derived from such changes, and also about how the difference between who are the environmental refugees and who are the economic immigrants would be defined. It is necessary to distinguish between the refugee and the immigrant, through the analysis of several factors, which can be summarized in an expression: voluntariness.

The economic immigrant - although there are discussions about the real voluntariness of the intentions of those who leave their place of origin in

search of a better life for themselves and their family (BAUMAN; EVANS, 2016) -, at least for conceptualization purposes, immigrants can return to their place of origin – the refugee would eventually perish due to persecution, if he did.

Some part of the resistance shown by some countries occurs because, when migrating economically, the person can do so due to climate change that have substantially changed their livelihood, a phenomenon that has already been observed in some Sub-Saharan African countries for decades (MYERS, 1993).

In addition to the limited predictability of the forecasts, there is also an obstacle to the lack of definition of the concept of environmentally displaced persons as refugees, since they are not encompassed by the international organizational system dealing with refugee issues. And one of the reasons why there is some resistance in broadening the concept, despite the imminence of an unprecedented humanitarian emergency, would be a possible incompatibility between the legal nature of individual right of the refugee status and the diffuse legal nature of the right to live on a healthy and balanced environment (RAMOS, 2011).

Within the Brazilian legal system, the concept present in Article 81 of the Consumer Protection Law (BRASIL, 1990) is frequently used to define what are diffuse rights, stating that these are rights of "of indivisible nature, held by indeterminate persons, linked by factual circumstances".

Internationally, and specifically about environmental issues, both the Stockholm Declaration on the Human Environment, of 1972, and the Rio Declaration on Environment and Development, of 1992, address that - directly or indirectly – the environment is set under diffuse legal nature, a concept that is brought into the text of the RIO92 Declaration, which states that the protection of the environment is of indivisible nature.

On this aspect, Lobry (2008, n.p.) postures that

Les réfugiés écologiques apparaissent comme les victimes d'une atteinte collective et grave à l'environnement. En premier lieu, ils sont les victimes d'une atteinte collective: en effet, les experts ne parlent pas de réfugié écologique ou singulier mais au pluriel, car toute atteinte environnementale touche la communauté dans son ensemble que ce soit au niveau local régional ou international. Une atteinte à l'environnement ne saurait toucher un seul

homme en particulier, un environnement sain étant un élément indispensable à la survie de tous².

The United Nations Framework on Climate Change has established in 2013 the Warsaw International Mechanism For Loss and Damage³, brought into existence at the Conference of Parties (COP19), held in Warsaw. The 2013 Mechanism was set up as means to cope with global warming, considering that, even after the reduction of gas emissions and the adaptation of populations to the new climate conditions, there would still be problems in infrastructure and ecosystems, due to the ineffectiveness of nations to cope with climate change, rendering the connection between human displacement and climate change not only clear, but inevitable. It is expected that at least 5 countries will disappear due to sea level rise in the next 20-30 years, mostly in the Pacific region (LOCKE, 2009).

4. The feasibility of conceptual expansion

When we consider the international protection granted to refugees because of the impossibility of return to their country of origin, due to a well-founded risk of death or persecution, the greatest asset protected by such a definition is life, which is central to international documents of Human Rights, as it is the case of the Universal Declaration of Human Rights, of 1948, in its Article 3.

Thus, if the purpose of granting the refugee status is to protect the lives of those who leave their places of origin without any trace of willfulness in their fleeing, the concept should also cover those who are victims of catastrophes, since for them, similarly, there is no voluntariness. This would be in accordance with the Conventions on climate change established on the first two decades of the twentieth century, to assess populations affected by environmental disasters and the economic consequences of it.

² Environmental refugees appear to be the victims of collective and serious environmental damage. In the first place, they are victims of collective damage: experts do not speak about the ecological refugee using the singular form, but do so in the plural, because any environmental damage affects the community as a whole, be it at local or regional level. An attack on the environment will not affect a single man in particular, a healthy environment is an indispensable element for the survival of all. (translation by the authors). In: LOBRY, Dorothée. Pour une Définition Juridique des Réfugiés Écologiques: réflexion autour de la qualification juridique de l'atteinte à l'environnement. In: Revue Asylon(s), 2008.

³ COP 22 established a periodical review of the Mechanism, every five years, with the first one expected to be held in 2019.

Besides that, deforestation, earthquakes, cyclones, storms and an impressive rise on sea level, expected to flood the whole archipelago of Tuvalu to destruction, are just a few examples of how climatic change can be aggressive. In a century in which major environmental incidents occur - such as the Haiti earthquake of 2010, The "Super El Niño", in 1998 (MCPHADEN, 1999, p.559-562), and the Yangtze river basin summer floods, also in 1998 (IDMC, 2015), generating flows of millions of internally and internationally displaced persons, or the events regarding the breaking of the Samarco dam in Mariana⁴, Brazil - a tragedy provoked by human action, in which, although there have been only internally displaced persons - there is no way to avoid the debate on the need for greater coverage of refugee protection for victims of environmental tragedies.

This considered, in case there is further expansion – vital and necessary - of the concept of the legal status of refugees, in order to cover those who are fleeing from climate change that threatens their survival, there should also be an expansion of the legal nature of the refugee status, as to prevent incompatibility, considering that the generations born under the agreements on climate and the environment will be *collectively affected*, without distinction, by global warming and other consequences, so that an *eventual* diffuse nature of the status shall also be namely included.

In addition, as Ingo Wolfgang Sarlet (2009) states, by not conferring different dialogues on rights of individual nature, as a possible collective scope to their legal core, there would be unwanted restriction of such rights, making it difficult to interpret and giving bias of paradox to individual rights. Likewise, Goodwin-Gill and McAdam (2007, p. 129) prescribe that

Where large groups are seriously affected by a government's political, economic, and social policies or by the outbreak of uncontrolled communal violence, it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual.

⁴ It is important to note that the collapse of the Samarco dam in Brazil has generated a flow of internally displaced persons. Since there was no boundary crossing due to the environmental damage, it cannot be implied that the victims would be embraced by the definition of refuge, here intended for other migrants, because one of the specific material limits of the conceptualization of the legal institute of refuge is to have, necessarily, crossed borders. It would not harm the arguments here presented – those on the broadening of the term – because those individuals who involuntarily migrate inside borders and have no intention to go back to their place of origin due to fear of death or persecution belong to the category of internally displaced persons.

Therefore, it is not possible to define that, even for those rights that are individual in its nature, that they would always be so, in their interpretation - although the scope of the present work is not to penetrate the interpretative specificity, but to dwell on the absence of conceptual encompassiveness. But still, about interpretation, the mere mention of human rights in international norms tends to be vague and, therefore, judicial activity is indispensable – which does not mean a convention on the subject is not necessary (RAMOS, 2016).

In such manner, on the breadth of the concept, there are two possibilities that enable the protection of environmentally displaced persons, within institutional arrangements to protect a larger number of potential refugees: to extend the legal nature of the concept, to embrace a possible collectiveness of the status, or to disregard the conceptual restrictiveness when its practical application comes to reality, within the institutions supposed to protect individuals in situations of refuge.

For the same reasons, it is relevant to mention a section of a decision of the Italian Court of Cassation on the non-existence of incompatibility between the application of a right of diffuse nature simply because it is not exclusively attributable:

non può essere negata tutela a chiunque sia interessato in relazione a un bene giuridicamente protetto per la sola ragione che questo non appare attribuito né attribuibile a lui in modo esclusivo. La prospettiva secondo la quale vi è protezione giuridica soltanto in caso di collegamento esclusivo fra un bene (o una frazione di esso) ed un solo determinato individuo, o un gruppo personificato – e quindi assimilato all'individuo - è condizionata da un'impostazione di tipo patrimoniale della giuridicità e rischia di mortificare in ragione del condizionamento l'irresistibile tendenza all'azionabilità delle pretese⁵

⁵ "Protection cannot be denied to anyone who is interested in a legally protected good for the sole reason that this does not appear to be attributed or attributable to him exclusively. The prospect that there is legal protection only in the case of an exclusive link between an asset (or a fraction thereof) and a single individual, or a personified group - and then assimilated to the individual - is conditioned by a capital-based approach to legality and is likely to mortify due to the conditioning of the irresistible trend of the applicability of the claims" (translation by the authors). In: ITALIA. Corte Suprema di Cassazione. Cass., s.u., 5172/70, de 6 de outubro de 1979 – Persona e Ambiente.

That is, the material conditioning imposed by international conventions should not stifle the right to protection that should be guaranteed also to environmentally displaced persons, because to do so would also revoke the protection of the right to life, closely linked to the premise.

In addition, depriving someone of legal status over their own situation, regardless of what that might be, constitutes an annulment of their own sense of existence, as it deprives this human being of his notion of belonging to the community in which he is inserted, since he ceases to be someone and starts to merely exist⁶.

But as our purpose is to infer that there is need for legal broadening of the legal nature of refugee status, as to encompass an eventual collective protection, we shall resort to the principles present on the Charter of Nations, reflecting those of *jus cogens*⁷, paramount and peremptory norms that all nations shall abide to. These norms derive from an inspiration of human cooperation⁸, present on Article 1 of the Charter. The integration to resolve problems of humanitarian character is one of the basis of the international legal system. And so is the right to life – an underogable norm, with *erga omnes* efficacy towards the subjects of the international community.

Considering that the group of environmentally displaced persons is under threatening conditions, just as the refugees from armed conflict and political persecution, the lack of coverage from the concept of refugee is not only a theoretical issue, but ultimately a threat to the *jus cogens* imperative

⁶ Idea taken from the following excerpt of Hannah Arendt's *The Origins of Totalitarianism*, which states that "The human being who has lost his place in a community, his political status in the struggle of his time, and the legal personality which makes his actions and part of his destiny a consistent whole, is left with those qualities which usually can become articulate only in the sphere of private life and must remain unqualified, mere existence in all matters of public concern". In: ARENDT, 1976, p.301.

⁷ The definition of *jus cogens* appears on Article 53 of the Vienna Convention on the Law of Treaties, posturing that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In: UNITED NATIONS. 1969.

⁸ The precise historical moment when *jus cogens* was created cannot be recalled, but it is taken by scholars as something that was organically developed, as "the international arena requires cooperation and simply being told that 'X is now the law' is unlikely to facilitate progress. Unfortunately, a debilitating critique of positivism as an explanation is that there is no pinpoint location for the birth of *jus cogens*". In: CONIGU, Stefano. *Jus Cogens: The History, Challenges and Hope of 'A Giant On Stilts'*. (Plymouth Law and Criminal Justice Review, 2015, p. 52).

norms, as it fails to give humanitarian protection to a group at serious risk of human rights violations, due to their displacement condition.

The obligation to protect the vulnerable was reaffirmed in the Millenium Declaration, which states that:

We [heads of State and Government] will spare no effort to ensure that children and all civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies are given every assistance and protection so that they can resume normal life as soon as possible

This implies that children and civilians affected by natural disasters and humanitarian emergencies of other sorts shall be met and protected *in equivalence*. The same document infers, under the same topic that, as means to “reaffirm our [the Nations] commitment to the purposes **and principles** of the Charter of the United Nations”, shall “expand and strengthen the protection of civilians in complex emergencies, in conformity with international humanitarian law” (UN, 2000).

Accordingly, it must be properly assumed that there is legal ground for the expansion of the concept of refuge as to encompass environmental displacement, since this Declaration places the victims of natural catastrophes under the same net of protection as those who are fit under the standard concept of refugee, brought by 1984 Cartagena Declaration and, therefore, there is guideline for the production of new, in-depth legislation concerning climate-related human displacement, despite the claims of incompatibility between the legal institutes above-mentioned.

5. Conclusions

World War II has affected nearly every global actor from the twentieth century, and the fluxes of migrants have prompted a reshaping of concepts on refuge, migration and statelessness. Mankind has not yet faced another international law catalyst driven by anthropogenic actions of such proportions ever since.

But given the alarming predictions on climate change – human-made or not -, the temporal lapse to reshape the concept of refugee status in order to embrace environmentally displaced persons seems scarce, since we have

a population which is likely to increase in the coming decades, and so must the ability to respond to the plight of present and future environmentally displaced persons.

The most alarming data on displacement includes a variety of locations that are most likely to disappear due to sea level rise and, still, there is a lack of encompassment from the legal framework when it comes to these individuals that have to flee from their home of origin due to environmental issues. By the year 2050, the contingent of 200 million displaced persons will be a reality and no longer a number on the pages of academic reports.

However, as fast as we are approaching, as mankind, the climax of global warming, the necessity of legal review is not being met, despite the urgent claims from those mostly affected by the catastrophes. And, until the present moment, specialists are not able to predict which portions of global territory will be most affected by climate change.

A part of the global community is reticent towards the broadening of the term refugee for the sole reason it is still impossible to know from where the fluxes of environmentally affected displaced persons are going to depart from. But since global warming does not pick countries on economic bias⁹, what these nations seem to ignore is their population might be among these numbers. And when this happens, mankind needs a steady legal framework.

Although there is space for relevant interpretative discussion on whether the system of international justice is fit to hold jurisdiction on this sort of concept broadening – and this includes conferring different dialogues to the current legal scenario, as stated by Sarlet (2009) -, even prior to that, there is an important discussion on material international law. There is a large group of potential displaced persons with an urgent plea for their rights, which are not being met by international conventions. And these are the victims of natural catastrophes.

The argument that there is a gap between the legal nature - as an individual right – on granting the status of protection to refugees and the diffuse, collective nature of environment, despite the controversies brought by the unpredictability of the climate prospects – shall not refrain the

⁹ “En effet, les causes «écologiques», politiques et socio-économiques qui conduisent au déplacement des populations sont multiples et complètement imbriquées et interdépendantes”. In: COURNIL, 2008.

international organizations from meeting the urgency of the subject. This argument, though, shall not prevail, inasmuch as the protection of persons at risk of having their personal integrity affected by external circumstances must be met.

In addition, there are guidelines for the expansion of the concept, such as the Millennium Declaration, which namely places those who are met by the worldwide net of protection of refugees and those who flee their home of origin due to environmental disasters under the same path, meaning that the protection of the vulnerable – regardless of which situation has caused the vulnerability - should be a priority, when it comes to human rights.

To imply that basic human rights shall be restricted in such terms is to conclude that all evidence provided on the immediacy of the matter is irrelevant for law production. To rely solely on theoretical background that prevents legal framework from being expanded, neglecting how the environment is intrinsically related to human rights is to deny the underogable nature of the foundational right to life.

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