



Constitutionalism of Climate Justice: Towards an International Legal Framework to Respond to Climate Related Migration and Displacement

C l i m M i g

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Migration and Displacement

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Teresa Thorp

t.m.thorp@uu.nl



Universiteit Utrecht

Introduction – Contemporary Models

Cross-border displacement resulting from natural disasters and the effects of climate change is a “clear cut normative gap”.

UNHCR; High Commissioner’s Dialogue on Protection Challenges
“Protection Gaps and Responses” (8-9 December 2010).

1. Definitions - climate refugee?
2. Displaced empirical research on developing small island states?
3. Treaty, plurilateral agreement or other legal instrument?
4. Slow onset responses to disaster?
5. Is the normative gap human rights, needs or desires?

New Question: If it is the *will* of the international community to govern the “normative gap” then what is this normative gap, where is it and what is needed to respond to the challenges?



Answering this Question Leads to an Alternative Approach

If there is a normative gap in legal frameworks then...

What is a norm?

Norms are a shared societal standard of behaviour

Nansen Principles:

- 8. Guiding Principles on Internal Displacement
- 9. More coherent & consistent approach – guiding framework

What is a legal norm?

Legitimises a norm and makes it lawful

Why does this matter?



Justice matters

What is Justice?

Universal conscience of humanity

Manifest in Values - Norms

What is Legal Justice?



Universal juridical conscience of humanity

Manifest in Legal Norms: Legitimate Principles, Rules, Stds
(not always identical to a “wish list”, different transcendent principles, e.g.,
cooperation is a derivative of good neighbourliness, inc cooperation + no harm)

**Do disputed norms underpin the
controversy surrounding the normative gap?**

**If so, how *ought* international law
govern these norms?**



**How ought
international law
govern these norms?
=
Structural issue**

**Solution: genetic
structural normative
composition &
Shared responsibility**

**Unified & Universal
Constitution of
fundamental principles
and consequential norms**

**Legal Justice
depends on quality
of the legal system**



*Normative Gap =
Constitutional Gap
in the
Legal System*

Systematics



Why Systematics?
because of limits in contemporary
subject/object, binary & hierarchical approaches

to law as ordered normative systems

Refugee	Not a refugee
Development	Not dev
Treaty	Not a treaty
Disaster	Not yet
Human rights	Collective rights

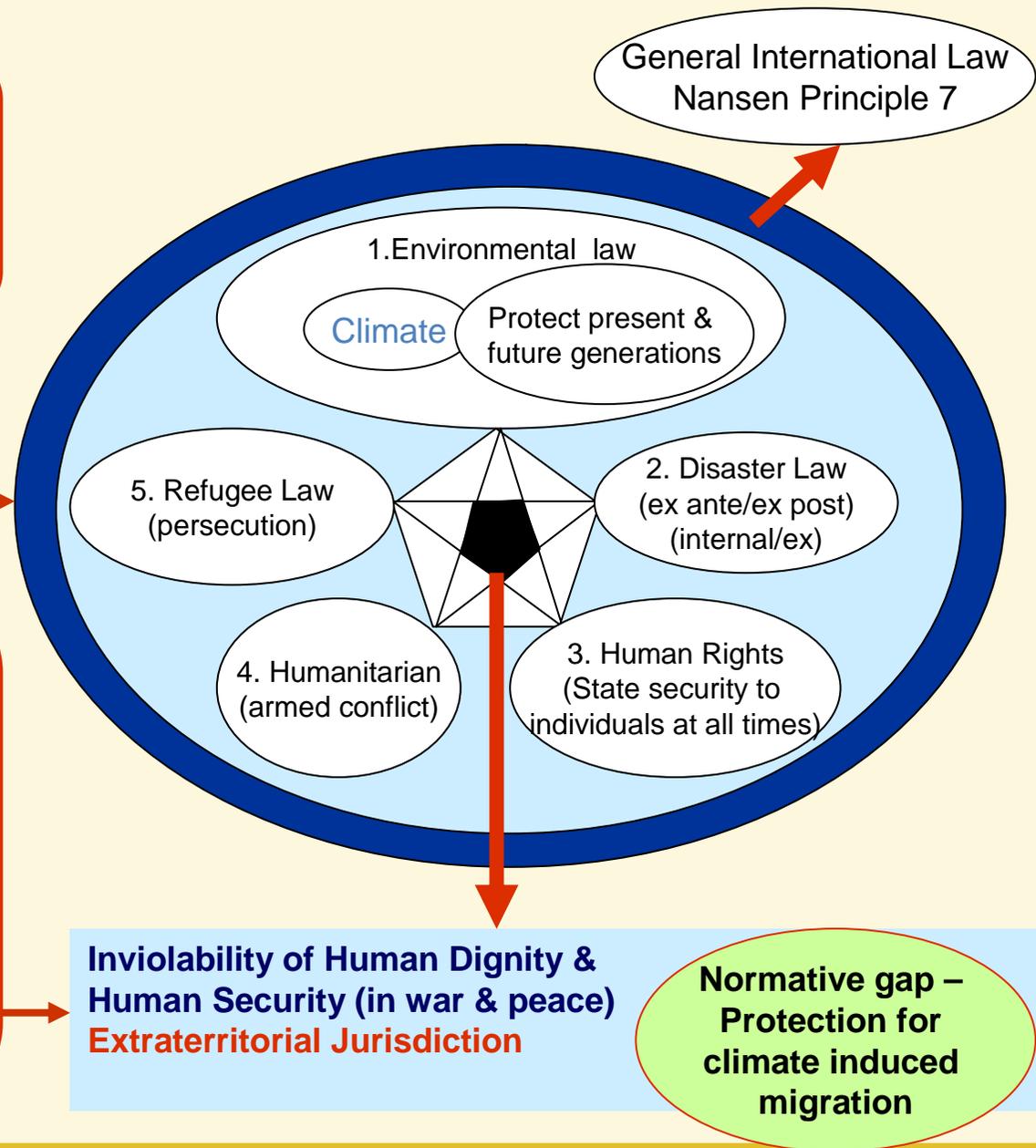


Introduction to Legal Systematics

Legal Justice Manifests In a Unified & Universal Normative Constitution

-
Global Obligation to Protect

-
Global Roadmap



Scenario Outline: Third Generation Rights as Peoples' Rights

- I. Getting **FROM** the supposition of a normative gap in international law concerning environmental migration and human rights to climate induced human mobility
TO a shared legal duty
- II. Static examples from the UNFCCC: One hub in the normative nexus (practice is more complex)
- III. **Recommendation: A New Way of Thinking about Climate Migration**

Leverage a Unified Constitutional Approach to attain Legal Justice at the Normative Nexus

(Outputs: effective governance structure; shared responsibility for human dignity;
can also hold IO's accountable for their conduct;
can hold private sector accountable by arts of incorp/memo of assoc, arts of assoc/by-laws;
a change in causation from proximity to harm to proximity to justice/human dignity...)

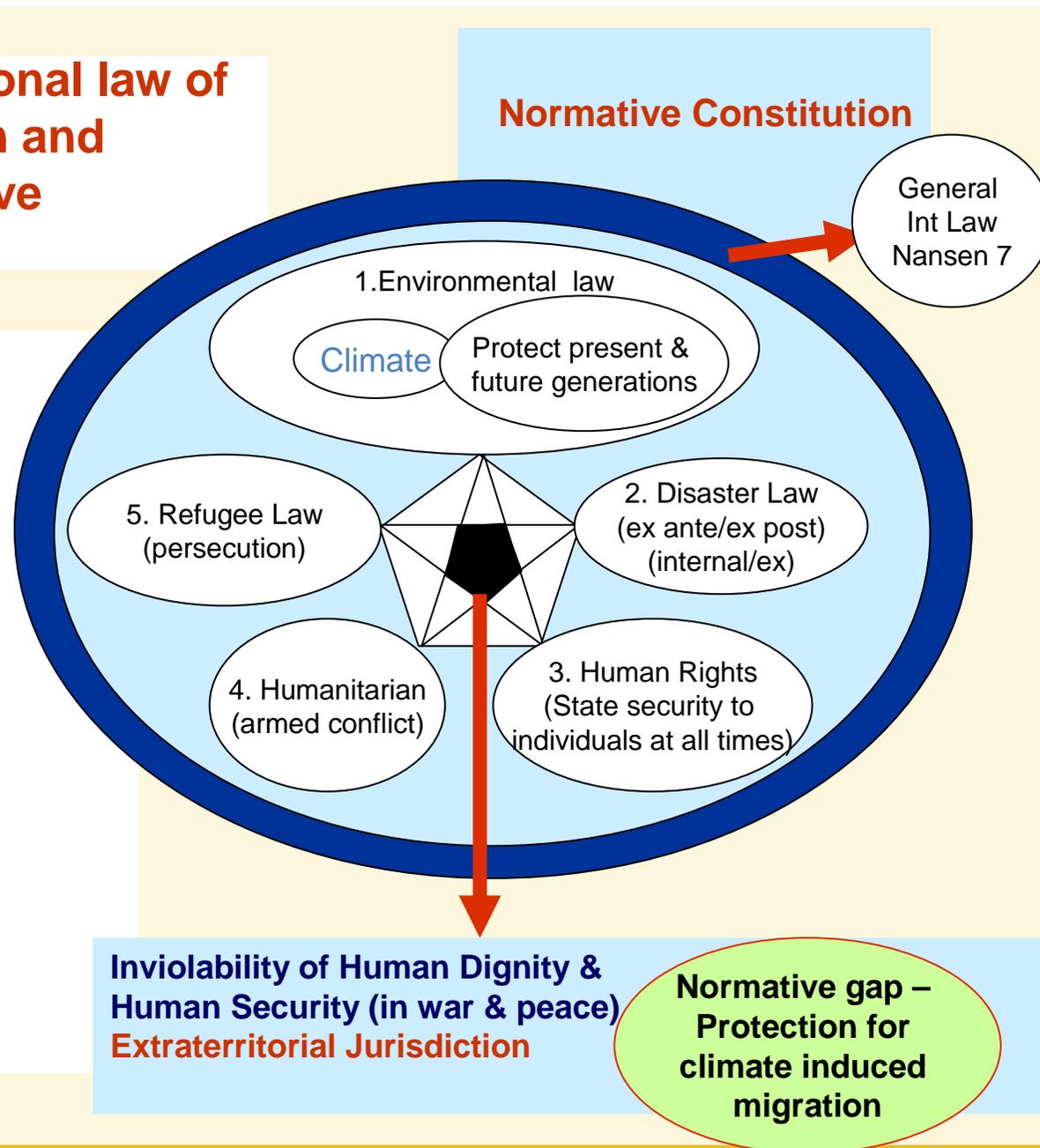


I. Relevance of international law of environmental migration and human rights to collective attribution

A. Environmental Migration and Climate – Towards a Legal Duty to Humanity

B. Human Dignity & Migration

C. Need to distinguish between a Duty to Humanity and Attribution



I. A. Normative Gap Environmental Migration & Climate: Legal Duty to Humanity

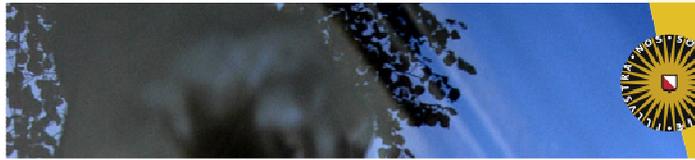
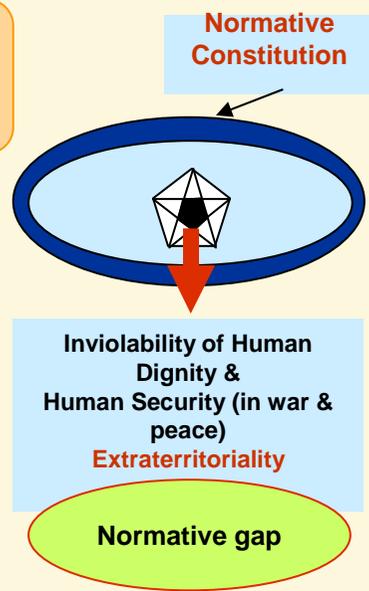
Forced Migration - element of coercion – actual or threat. Causation:
Proximate (persecution or natural disaster) – Multi-Causality - Ultimate cause (climate).

Law - legal cause - liability & responsibility.
Responsibility continuum – proximity to harm & not actual cause.

Plug normative gap (where no consensus on legal response),
there may still be obligations on the global community to protect
irrespective of proximate cause – evolution of preemptive rights

New Proximity Doctrine: Climate / Intergenerational justice,
Human dignity, Human security, Human rights

But needs: *Constitution of Norms* derived from transcendent principle of inviolability
Norms: not interchangeable, static/dynamic specification, interrelated and interdependent
Constitution: governance by fundamental legal principles and consequential norms



I. B. Human Dignity and Migration

- New legal response: fuller a/c of normative plurality - constitutionalism of a kaleidoscopic normative nexus – reformulation of extraterritorial jurisdiction for legal problems that reside at the normative nexus.
- Recap: assume climate induced migration resides at a normative nexus that invokes a legal duty on humanity to protect and a transcendent principle of inviolability. The nature of that duty may be collective and global. States would have transferred a degree of sovereignty to the competent authority governing the global commons in question.
- If, amongst all other pressing agendas, it is the *will* of the Parties to respond to climate-induced migration (determined by votes),
 - the securitisation of people needs to be defined in a constitutive form
 - so that the obligation to protected persons is sheltered from opportunistic reforms that ignore universally agreed legal principles.



I. C. Duty to Humanity v. Attribution

- A. If there is a collective duty to humanity, then what about attribution?
- B. Primary duty is on State's to protect their people (Nansen 2) but international organizations often assume responsibility (Nansen 9)
 - ILC's draft articles on the responsibility of international organizations
 - IO's **conduct** determines culpability for a wrongful act – “entails international responsibility” “for the purpose of attribution of conduct, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization”.
 - Not only a treaty question: decisions can also create law.
 - UNFCCC COP Cancun para 14 (f) adaptation – UNHCR/IOM conduct & attribution
 - **Actual element of damage or causation does not seem necessary**
- Attribution of conduct – content of primary obligation & who has effective control (**operational control** over the activity)



Summary

	State sovereignty	Constitutional sovereignty
Integrity	Territorial	Global commons: common heritage / concern mankind
Inviolability	Borders	Humans
Unity	State supremacy	Humanity
Supreme lawmaker	National legislature	Competent authority or an association of competent authorities at the normative nexus (shared)

Benefits of a codified constitution:

- Understand complex normative nexus, negotiate *lex ferenda*, allocate scarce resources, address inconsistencies in interpretation, application and doubling up of efforts, establish transparent guarantees..

But... depends on the will of the parties.

Premature

What need is there for a social contract anyhow?

Implementing Nansen Principles: Why not reach consensus on the constitutionalism of the hubs at the normative nexus?



II. Mobilising the Legal Principles of International Climate Law to Guarantee and Fulfil the Rights of Climate Migrants

- A. Collective Responsibility in the Context of International Climate Law
- B. Climate Justice and Constitutional Normative Architecture
- C. Attribution of Conduct that Mobilises the Legal Principles of International Climate Law



II. A. Collective Attribution of Responsibility in the Context of International Climate Law

- 1992 UNFCCC: legally binding, legitimate, central-point for climate law
- UNFCCC COP may acknowledge and adopt conduct to address climate change and human security issues (threat to food security, coping with migration)
- ILC draft articles on the responsibility of international organizations.
 - Article 9 provides that under international law if and to the extent that an IO acknowledges and adopts the conduct in question as its own then there is an attribution of conduct.
 - 2007 Bali Action Plan, 2008 Poznan (COP 14), 2009 Copenhagen (COP 15), 2010 Cancun (COP 16), 2011 Durban (COP 17).
 - Outcome doc from Copenhagen, COP invited all Parties: Irrespective of where climate change induced displacement, migration and planned relocation occurs (to understand, coordinate and cooperate at national, regional, and international levels).
 - For the purpose of attribution of conduct, the question is whether these directions accord with the constitutive elements and whether the COP has any operational control.
 - Constitutionalism of the UNFCCC is underpinned by principles but informed by consequential norms. There is a need to understand such actions at the normative nexus in a structured way, i.e., interfaces with UNHCR/IOM...



II. B. Climate Justice and Constitutional Normative Architecture

- The UNFCCC COP could also derive consequential norms from other fundamental constitutive principles
- Article 3 (1) “1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof”.
- Attribution of conduct is in part due to epikeia, which is legal equity. Mobilizing the legal principles of international climate law to inform the constitutional order of climate related migration and displacement gives effect to epikeia.
- COP decisions also reflect Art 3 (1): “taking into account their common but differentiated responsibilities and respective capabilities”



II. C. Attribution of Conduct that Mobilises the Legal Principles of International Climate Law

- Article 3 (1) “1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof”.
- Responsibility to present and future generations – actual and pre-emptive responsibility
- Respective capabilities – burden is a question of capacity, which could also reflect on attribution of conduct at national, regional and international levels.



II. C. Attribution of Conduct that Mobilises the Legal Principles of International Climate Law

- Article 3 (2) of UNFCCC: “The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.”
- Principle of solidarity
- To mobilise the legal consequential norms in terms of climate-induced migration, supplementing a deficit for developing countries may link to a needs based test (a necessity test) and a test of special circumstances (determined by proportionality and merit determined by vulnerability, capacity & local endeavour). The test of special circumstances is equally applicable in terms of reducing an excessive burden for all parties and
- It interfaces with other norms: disaster law – vulnerability and capacity assessment



Findings & Recommendations

1. Move from developing a new instrumental treaty solution to filling the normative gap with existing law – IO decisions can establish responsibility
2. Move from human security as a cliché to human rights and human security as a manifestation of human dignity
3. Move from a developed/developing or North/South divide to a collective duty to humanity
4. Move from fragmenting / disordering legal principles to a unification of universal principles and tailored consequential norms
5. Move from illegitimate arguments about causation to legal attribution of conduct based on constitutive elements
6. Reformulate justice as a normative function of the quality of the legal system that governs climate-induced migration
7. Key point: leverage constitutional governance as a new way of thinking about climate displacement



Conclusion

- Developing a uniform and universal constitutional framework to respond to climate induced migration and displacement at the normative nexus is possible and could provide part of the solution and will mobilise the Nansen principles.
- Trindade: international law for humankind is evolving towards a new *jus gentium*.
- Constitutionalism of the normative nexus may be the catalyst to finding a just legal response to climate-induced migration and displacement.



**Constitutionalism
of the
Kaleidoscopic
normative nexus**

**Thank you for
your
consideration**

**Comments &
Feedback
welcomed**

Teresa Thorp
t.m.thorp@uu.nl

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