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**The local dimension of international legal and normative frameworks: how it works on the ground. A new 'protection gap'.**

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### ***Introduction***

We can trace a 60 year-long history of human rights protection for involuntary migrants. It is a long-standing, accepted and, indeed, an expanding concept which is embedded in the responsibilities of states, international, and intergovernmental actors. A large portfolio of instruments, conventions and covenants now protects different categories of migrant, whether forced or voluntary.

In recent years the availability, form, purpose and jurisdiction of legal and normative frameworks to protect the rights of people whose livelihoods are made vulnerable by environmental and climate change has been extensively researched and debated. The discourse has covered many dimensions: conceptual challenges, the semantics and specificity (or not) of the category 'environmental migrant', whether extant or new legal frameworks and conventions are needed, policy and operational considerations, competency of different authorities, who the duty bearers are and questions of accountability (eg Biermann and Boas 2010; Kälin and Schrepfer 2012; Koser 2011; Laczko and Aghazarm 2009; McAdam 2010; UNHCR 2011; Zetter 2009, 2010). In general, the focus of the discourse has been on national and international levels and on the rights of those who are displaced rather than those who remain.

This paper adopts a novel focus by reviewing the local dimension of international legal and normative frameworks of rights protection, examining in particular how these frameworks operate (or, in reality, fail to operate) at the local level. It only considers these questions in the context of areas which might be predisposed to out-migration, not destinations where equally significant issues of rights provision and protection for the newly arrived migrants arise.

Using data from recent and ongoing research projects on environmental displacement in Bangladesh, Vietnam, Ethiopia, Kenya and Ghana, the paper makes

four arguments to substantiate the view that a new, significant and little understood 'protection gap' exists.

First, there is little if any evidence that legal and normative rights-protection frameworks are available or accessible, 'on the ground', to populations vulnerable to the risk of displacement because of environmental change.

Second, formal rights-based concerns do not appear, at present, to inform or mediate households' decisions to adapt or migrate in the context of environmental stress. Rather, other factors such as household security, loss of customary rights, gender considerations and social networks are much more significant determinants.

Third, at the local level, the lack of evidence on formal legal and normative rights frameworks contrasts with the importance attached to customary and collective rights and cultural norms that mediate responses to environmental stress including migration.

Fourth, whilst the five countries recognise the negative impacts of climate change in national level policies and strategies, including the propensity of communities to migrate away from environmentally stressed locations, these concerns do not translate into effective rights-based protection. National governments appear unwilling or unable to provide this protection

The paper contends that whilst mobility is a crucial strategy in how people respond to environmental stress at the local level, mobility decisions cannot be separated from wider national level socio-political and governance determinants which structure their lives and livelihoods at the local level.

Any discussion of climate change, migration and rights must be premised on several caveats. First, although growing evidence links environmental change, and climate change in particular, with migration, such change is rarely the unique driver of population displacement. The changes are one, significant, determinant, operating in conjunction with economic, social and political factors, and linked to existing vulnerabilities. Direct causal links can only be proved in exceptional cases. Next, the claim that those who migrate in the context of environmental change should be protected by specific rights-based legal and normative frameworks (which might parallel the Refugee Convention), is now recognised as misplaced and unsupported. It is conceptually difficult to establish a precise category of environmental or climate migrant; the extent to which migration is 'forced', is open to debate; and the substantial majority of those affected will remain in their own countries. (Boano, Zetter et al. 2008; Black 2001; Castles 2002; Bates 2002; Zetter 2010). Whilst 'protection gaps' remain, in general the 1998 Guiding Principles on Internal Displacement provide an adequate, if not fully formed, instrument for protecting the rights of such migrants. Finally, the focus on the rights of those who migrate detracts attention from the rights of two other affected groups: those who wish to remain and adapt or those who are unable to migrate, the trapped populations highlighted in the Foresight report (2011).

### **What happens locally?**

Here I review just two of the five countries of my research. Despite their contrasting political structures and diverse histories of migration and environmental stress, a remarkably consistent picture emerges in which the issues of rights and normative and legal frameworks of rights protection are evident only by their neglect.

**Vietnam**, as regards short term displacement impacts of rapid onset disasters, there is well developed emergency response capacity and recovery planning. As might be expected in what is still a one party state and a nominally centrally planned economy, civil society and NGOs do not feature significantly: instead response is concentrated in national and, particularly, at local government administrative levels. Whilst the government of Vietnam does not articulate a rights-based formula in its response to disasters, in effect emergency assistance and population return after the disaster reflect international humanitarian practice.

What happens on the ground in terms of longer-term strategic responses to climate change, including migration? This is more complicated. A twin track response is evident: and from a local perspective neither strategy appears to be mediated by legal and normative frameworks of rights protection.

On the one hand, 'living with floods' is a concept, policy and a regular part of life which is firmly embedded in national development strategies. Indeed, of the five countries, only Vietnam has mainstreamed a strategy to relocate households. This translates into adaptation and planned relocation with, for example, the resettlement of at least 135,000 households living in high-risk areas in the most flood prone parts of the Mekong delta to safe areas by 2015.

Significantly the Government uses the term relocation, not resettlement or displacement – the latter in particular is perceived as a reactive and uncontrolled process in comparison to proactive government planned relocation strategies and regulated migration policies. Accordingly the strategy reflects state-driven migration priorities and implementation machinery. Local community involvement in decision making processes is heavily circumscribed. Local leadership plays a dominant role in decisions on the relocation plans; collective decision making mostly concerns the logistics of relocation, not the principle. That there might be rights-based claims or opportunities arising from relocation, for example in terms of full participation of local communities in developing and managing the relocation strategies or more pluralistic approaches to decision making, is a non-existent concept in current policy agendas and frameworks.

Paradoxically, Vietnam is far advanced in comparison with the other four countries in one component of rights-based protection for households subject to relocation. For communities that are designated for compulsory government relocation or disaster mitigation programmes, the schemes provide compensation and interest free loans to the targeted populations for house construction. Inevitably implementation is complex and access and eligibility criteria do not necessarily work equitably. Evidence suggests that these projects may be pushing poor households into poverty

– replicating the experience of development induced relocation schemes elsewhere in the world (Dun 2009).

Yet, despite the direct and indirect regulation of mobility in the centrally planned economy, spontaneous internal migration - the second migration response - far exceeds planned migration and is likely to increase with worsening environmental conditions. Thus as regards voluntary response, whether precipitated by the perceived increases in river bank erosion or the intensity and frequency of flooding, how households themselves choose to respond is in stark contrast to state-driven planned relocation. The decision to voluntarily migrate or stay put, the propensity for increased seasonal migration or a permanent move to urban locations, these are not responses mediated in any way by rights protection frameworks. Indeed, spontaneous migration seems to be a trade off which challenges the core rights which citizens enjoy in Vietnam. This is because spontaneous migration means a loss of state-distributed rights such as welfare benefits, food subsidies and schooling that come from the household registration system (*ho khau*). These migrants are, in effect, trading off state provided rights against the opportunity to enhance their economic position, usually by in accessing the urban economy. Whilst it is true that these migrants often keep a toehold in their community of origin to retain their registration – for example one or several members of the household may remain behind – in reality this seems to be a staging post in the process of an incremental/progressive relocation to the cities. The state’s view on un-managed migration is reflected in the invisibility of unregistered migrants in the state system and therefore the question of migrant rights does not arise.

Nevertheless, despite official resistance, spontaneous migration has far exceeded planned migration in the last two decades as Vietnamese seek to benefit from the country’s urban-led economic expansion. In response to worsening environmental conditions, and thus increasingly stressed livelihoods, spontaneous migration is clearly evident and likely to expand as a key livelihood strategy.

In **Bangladesh**, public discourse on the threats posed by climate change is intense and the government, as well as NGOs, has claimed international ‘leadership’ of this agenda. Accordingly, the public policy framework is no less developed than in Vietnam, but there are two crucial differences in practice. Yet the principle that the rights of those affected by climate change should in some way be protected forms no part of the discourse.

First, in contrast to Vietnam, as regards long term impacts, government policies and actions do not address this issue displacement although acknowledging the IPCC prediction of 20 million displaced people from coastal areas by 2050 IPCC (2007). Instead, all the proposed actions in the Bangladesh Climate Change Strategy and Adaptation Plan (GoB 2009), aim at maintaining the population in villages by developing DRR and mitigation infrastructure (cyclone shelters, embankments, afforestation of coastal areas, cross-dams) or adaptive measures, such as developing salty or flood resistant crops or accesses to new resources of fresh water.

No provision is made for resettlement despite the predicted volume of displaced people. Indeed, whilst not actively resisted, as in Vietnam, internal migration and especially rural to urban migration is discouraged. There is limited official recognition of the concept of internal displacement.

Second, to the extent that the displacement impacts of climate change are taken into account, they are framed in the context of emergency relief programmes and short-term humanitarian provision in the face of rapid onset disasters. These programmes, with substantial international assistance, help to avert humanitarian disasters, but leave people in a very precarious situation, particularly in terms of sustainable longer term strategies for livelihood reconstruction. Relief programmes terminate rapidly yet livelihoods are permanently depleted resulting in the progressive impoverishment of affected people. The government subsidises the reconstruction of houses destroyed by cyclones, in order to encourage return to settlements destroyed by the disaster - consistent with the long term strategy of rural adaptation. Moreover, the right to compensation is limited since large numbers of those who are displaced cannot rebuild because their land has been eroded or is still flooded years after the disaster. Those affected in this way do not have the right to be resettled or compensated. In the same way, people affected by river bank erosion have to cope with displacement independently. Land redistribution processes exist but they inadequately define the rights to compensation.

Bangladesh has well developed constitutional provisions for civil and political rights and a very active civil society which might be expected to articulate rights-based principles and hold government to account. However, the rights of 'displaced people' and people susceptible to 'displacement' in the context of environmental stress and climate change, are yet to be recognised in this legal and constitutional framework. Despite using terms such as 'environmental refugees' or even 'climate victims' in official Bangladeshi documents, these are not formally defined, nor is there any indication of how such people would be identified and their needs or rights assessed. To the extent that environmental displacement is acknowledged, this is more as a future challenge, giving the impression that mitigation and adaptation policies have been sufficient, up to now, to contain the impacts.

As regards the right to compensation for cyclone damage and flooding, endemic corruption, the lack of procedural transparency and the presence of local power brokers limit the extent to which most poor people can make claims. The beneficiaries of river bank erosion victims are generally the previous large landowners.

Cyclone Aila, in 2009, illustrates many of these rights deficits. It left at least 500,000 people temporarily landless and homeless. The fortunate ones reinstalled themselves on their land once the environmental stress was over. Those who permanently lost their land simply joined the broad category of poor and landless displaced. There were, and are, no longer term policies for rehabilitation or relocation and there is no machinery to define what rights those who are permanently displaced might expect and how these might be protected.

In short, the impacts of climate change in general, and population displacement impacts in particular, are framed as a humanitarian challenge in Bangladesh, not a developmental challenge as is the case with Vietnam. Despite, or perhaps because the two strategies neither effectively take into account the gradual impoverishment and vulnerability of affected populations nor provide any recognisable rights protection, a process of silent and incremental out-migration as landless labourers in nearby villages or by moving to towns and cities are the main options.

### **Migration, Displacement and Rights**

These two vignettes provide a revealing account of the neglect of rights and rights protection at the local level for people impacted by environmental stress. On the ground at the local level, where we might expect to find practical evidence of rights informing the decisions that people make about their livelihoods in the context of changing environmental and climatic conditions, we find no verification. At the local level, neither the expectation, nor the fulfilment of rights informed migration decisions – a finding repeated in all five case studies. The issue of rights and rights protection either as a factor in migration or at the destination are absent. The picture in the other three countries of my research is no different. These findings and the failure of states to provide locally effective legal and normative rights protection frameworks are all the more disturbing given the emphasis which researchers and policy makers have given to this concern (eg Laczko and Aghazarm/IOM 2009; Kälin 2010; MacAdam 2010; Zetter 2010).

It is not just that there is a failure to respect rights. Rather, what is remarkable is the almost complete absence of any discussion of the principle of rights attached to displacement, let alone formal legal and normative frameworks of rights. With respect to slow onset impacts of climate change failure to recognise that there might be rights-related considerations for affected people is underscored by the limited policy response on the ground despite national level strategies. Respondents in Budelangi, Kenya (an area of recurrent flooding), speak for most people at the local level when they say of the government's policies to tackle environmental stress, 'they do empty promises', 'they are only acting by mouth'.

For sudden onset events the picture is scarcely better. Taking the three scenarios set out in the *1998 Guiding Principles on Internal Displacement*, we find modest recognition of the respect for rights *during* displacement as a result of natural disasters (largely displayed in humanitarian responses), but only very limited acknowledgement of rights *before* displacement (for example in formulating DRR policies and strategies) and *after* displacement and in planned resettlement (for example access to compensation or resettlement strategies).

My evidence explains that whether households migrate or adapt is not determined by recourse to civil, political and economic and social rights. It is contingent on a complex set of factors – the intricate dynamics of household livelihoods, household demographics, poverty (but not extreme poverty which generally inhibits mobility), limited access to cultivable or grazing land and/or declining productivity, the

resources available to fund the risks of migration, the social networks that facilitate migration destinations, and the scope and opportunities to access urban labour markets. Migration undertaken where environmental factors play a part is largely a survival strategy. It ensures household livelihoods, relieves the pressure on those from the household who stay and opens connections in town for those who may follow later on; in the same way, the dispersion of migrant kin in different locations broadens the possible networks for jobs or further settlements.

Not only is the decision to migrate made in the absence of any consideration of rights, where the environmentally displaced migrant end up and how they settle in (usually urban) areas is similarly devoid of legal and normative frameworks to protect their basic rights. In the absence of any formal planned strategy migrants have to rely on the power of (corrupt) local politicians and community 'entrepreneurs' to settle on land illegally and work under exploitative conditions in the formal or, more often, in the informal sector. To this extent they are little different from the majority of the urban poor and those who have spontaneously migrated for other reasons.

### **Framing an alternative view from below**

As regards civil society in these and the other countries, their capacity to advocate, promote and co-ordinate an active defence of human rights remain weak, despite the fact that civil society is very active in countries like Bangladesh. On the other hand, civil society and local community organisations in all the countries (most notably Bangladesh) have experience in coping with disaster relief – including temporary population displacement – and thus potentially provide a platform for developing a capacity to respond to the human rights of populations increasingly displaced by the impacts of environmental change.

But there is an alternative way of framing how rights are articulated from below, not as formal constructs of the state but informally expressed in customary rights, collective practices and cultural norms in relation to land and community that mediate responses to environmental stress including migration. Here, I draw on some preliminary analysis of field work recently completed in Kenya but borne out in Bangladesh and Ghana.

### **Kenya**

Ethnic allegiances may be a source of cohesion and solidarity within the community providing the basis for customary rights and practices which underpin traditional measures of adaptation now confronting increasingly hostile environments. Development NGOs support these customary systems and seek to adapt them to contemporary conditions. The land tenure system influences community solidarity and cohesiveness. Thus traditional inheritance systems are matched by access to land that is regulated by customary power structures of village elders who reserve land for grazing regeneration and rotation. Collective farming and diversification are mobilised and partial destocking of cattle before the dry season as a risk diversification strategy is promoted as a result of NGO programming. Strong internal solidarity acts to alleviate individual household shocks. This if a household loses

cattle it generally supported by the community. This reduces the imperative to move in a context of environmental degradation, at least as long as the whole community is not affected and is still able to react.

Moreover, there is strong cultural resistance to migration amongst some ethnic groups where mobility is strongly opposed. Environmental shocks are traditionally dealt with by cultural communal solidarity not by 'running away': the community encourages resistance towards migration by fuelling fear of the exterior, the feeling of illegitimacy and insecurity once outside the community's boundaries. Elders' discourse and stories sustain this collective behaviour. Recurrent was the assertion in field work: "But I cannot go there, it is not my land!" The problem is not that they will lack title deeds (they do not have them for their own land anyway) but that they feel they will experience difficulties in settling or adapting to another environment, not to say exclusion or violence which is, of course, endemic in many of Kenya's border areas. This assessment was particularly strong in Budalangi. People refused government resettlement plans because it would have implied settlement in another tribe's territory with another environment and habits. "Have you ever seen a hippo leaving the water to go and settle in a rocky place?" illustrates an elder.

For the more closed society in Pokot, the community network clearly plays a strong counter incentive to migration. In more open societies such as Kalkalcha and Busia, communities and family networks also have mechanisms to alleviate shocks which enable people to remain. The example of Budalangi is relevant: when the seed stocks have been washed away by the floods, the neighbouring villages helped them to renew the stock.

Notwithstanding community-based coping mechanisms and 'adaptation' to slow-onset disasters such as droughts, two other factors are significant.

First it should not be forgotten that in Kenya, as in Bangladesh, many rural households in the more vulnerable regions of the country rely on substantial and sustained emergency food aid distributed by the Government, the Kenyan Red Cross and other NGOs. This may act as a safety valve in relation to decisions to migrate and in protecting customary coping mechanisms since what is remarkable is the way the assistance appears to be so fully, almost automatically, integrated as a coping mechanism in household livelihood strategies in Kalkalcha and North Pokot, for example.

Second, there is deeply embedded suspicion of government policies on land issues in Kenya with respect to planned resettlement projects and the practice of forced evictions. However, the issue here is not just the way the internalisation of customary rights and cultural precepts and beliefs condition responses to environmental stress – given that out migration from these districts is happening anyway.

Rather, a different set of questions arises. First, the evidence illustrates the way in which communities have recourse to very different conceptions of rights which are

deeply embedded in local cultural traditions and practices. Under conditions of increasing environmental stress, the question is how sustainable and adaptable these norms are, on the one hand, and how they might be reconciled with the formal legal instruments of normative frameworks of rights, if these could ever be promulgated by states. Second, these examples raise the question as to what role NGOs and civil society organisations might play in mediating and enacting rights at the local level. Third, it is interesting to speculate on the extent to which the distribution of food aid also acts as safety valve to relieve pressure for a wider political discourse on rights.

Beyond the specifics of environmentally stressed communities, a rights-based discourse opens a fascinating window onto the wider meaning of development as the 'modernisation' of state apparatus expressed through actions such as promulgating legal and normative tools and instruments.

### **National level accounts**

That we find no articulation of formally constituted rights, nor even active discussion of rights in relation to the displacement impacts of climate change at the local level is surprising in itself. This neglect, however, can be explained by briefly examining how both national responses to population migration and the provision of rights are shaped and instrumentalised by governments at the national level <sup>1</sup>. The five governments in my research are, on the whole, unsympathetic to promoting human rights policies and practices. These concerns are only weakly embedded in the political discourse.

This is because the nexus of legal and normative rights protection frameworks on the one hand, and government policies related to migration and displacement on the other, are mediated by the politico-historical experiences and contemporary contextual factors in each country. These include: the past and present patterns and processes of migration and displacement; the socio-economic and developmental circumstances of the country which influence population mobility, especially internal migration; the political saliency of migration/displacement and the extent to which migration policy features in government discourse and action; and the government regime and its disposition towards human rights.

In other words, migration histories and politics shape the way in which migration policy regimes for the environmentally displaced are conceived and framed and how rights are conceived and articulated. Political sensitivities with respect to the legacy of migration histories and to institutionalising rights-based norms and legal instruments in the five countries have a significant bearing on why they are reluctant to engage in debate on these issues. In practice, only in Vietnam are there (unsuccessful) policies that actively seek to prevent population mobility (through the household registration system), although there are implicit controls in Ethiopia (through land allocation entitlements). Yet in Ghana, Bangladesh and Kenya the lack of policies and strategies to tackle the impacts of the substantial internal migration

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<sup>1</sup> for a fuller account see Zetter and Morrissey (2012).

that takes place, or to acknowledge the way in which environmental stress may accelerate the process, is striking.

Episodic and often traumatic migration histories and thus the complex political milieu within which internal migration sits - the latter often intimately tied up with access to land and land rights – are highly sensitive phenomena in all five countries. A reluctance to acknowledge the phenomenon of migration and to develop policies to manage the social and economic consequences, is the outcome of this politico-historical legacy. Failure to advance rights-based responses to these consequences, for example through the 1998 *Guiding Principles on Internal Displacement* which none of the countries has adopted, is symptomatic of the reluctance to develop policies and strategies to tackle internal migration. Significant also is the fact that Bangladesh, Kenya, Ethiopia frame the population displacement impacts of environmental and climate change in terms of a humanitarian 'default' position not a developmental challenge.

These outcomes determine the countries' disinclination to engage with the politics of and policies for migration: this is mirrored in their reluctance to address human rights concerns - hence their failure to develop legal and normative frameworks to protect the rights of migrants in general and, more specifically, in relation to environmentally displaced people. The prognosis for overcoming the political denial of migration as a policy and social challenge is poor. However, more problematic is an enduring resistance to developing practical instruments and measures at the national and local level to protect the rights of people who are internally displaced, not least those who are displaced by situations where changing environmental or climate conditions play a part.

### **Conclusions – what needs to be done?**

We are familiar with discussion of the 'protection gaps' pertaining to the rights for people susceptible to displacement because of environmental stress and the process of trying to fill these gaps. The assumptions behind such discussion are that a) we have identified gaps rather than wholesale breaches, and b) that the gaps could be closed mainly by refining existing instruments and norms. What this paper has revealed is that these assumptions are largely misplaced and, as a result, a rather different but significant protection gap exists. Recognising that governments are the duty bearers, none of the countries has operationalised the *1998 Guiding Principles* at the national level: this means that they do not adequately protect those affected, or displaced, within their own countries by climate change related events. Of greater concern is the lack of any evidence that rights are articulated at the local level through any formal instruments or even 'soft law'. People whose lives are made vulnerable because of environmental stress have no recourse to rights-based defence of their interests.

1. A paradigm shift is needed at national level concerning internal migration, recognising its necessity or inevitability: this would be a first step towards the definition of policies taking into account the needs and rights of the migrants. New thinking is needed to respond to slow-onset disasters and new policies and tools

must be designed which take account of protection precepts and practices. This is where most needs to be done, but where the scope to innovate and to adapt existing norms and practices is greatest. Rethinking DRR in terms of slow-onset disaster is a remarkable challenge.

2. Similarly, a paradigm shift is needed at the national level with respect to the protection of migrant rights, including those susceptible to displacement and diminishing capacity to adapt because of environmental stress. The politico-historical legacy of resistance to migration in these countries and finding ways of working with customary attitudes and perceptions constitute major challenges.

3. At the international level, the UNHCR and IOM have taken the lead in developing policy and operational responses (UNHCR 2009, 2010, 2010a, 2011; IOM 2009, 2010), but this has been problematic. But, at the 2011 UNHCR Ministerial Consultation (UNHCR 2011), governments declined to support the extension of UNHCR responsibility to protect those displaced by environmental or climate disasters. Given the protection gaps, humanitarian actors must provide stronger advocacy for states to support UNHCR's protection role. In this context the development of the 'Nansen Process' with its focus on protection for trans-border displacement will help to overcome this significant legal and normative protection gap.

4. Humanitarian and development actors must adopt a higher profile and provide concerted and co-ordinated action. They should encourage national governments to adopt and mainstream protection policies and norms as part of governments' adaptation, mitigation and development programmes as well as international and regional agreements for temporary and complementary protection. They must ensure that government-led resettlement projects are inclusive and do not compromise people's rights and entitlements. They should support civil society actors in their rights-based advocacy and community empowerment on behalf of populations vulnerable to environmental displacement. And they could support for the innovative 'Nansen process', initiated by the Norwegian Government in 2011 (Nansen Conference 2011), now partnered by the Swiss Government and the UNHCR, with the aim of developing policies and capacities to manage climate-change-induced displacement and afford appropriate rights protection for those susceptible to these impacts.

5. All these stakeholders have a duty to ensure that rich countries fulfil their commitment and adequately finance the measures to address climate change induced displacement, migration and planned relocation agreed in the breakthrough Paragraph 14(f) of the Cancún Framework for Adaptation (UNFCCC 2010).

A perspective on rights-based protection from below demands highlights profound challenges and demands radical action. Without this, the risk is that millions of 'forced migrants' will make even more remote achievement of the MDGs.

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