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Responsibility to protect (R2P) revisited

Towards climate change-related
obligations of states?



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Abstract

Climate change constitutes the greatest environmental threat humanity has ever faced and will exert measurable impacts on different scales. Many changes in the world's climate have already been observed, including sea level rise, glacier retreat, increases in global temperature, and more severe extreme weather events. Over time, climate change will manifest itself in myriad ways, such as negatively affecting human health and exacerbating existing inequalities. Unfortunately, the international community appears incapable of effectively confronting climate change. Therefore, new and innovative approaches are required to cope with this global challenge.

The focus of this dissertation is to analyse whether the concept of responsibility to protect (R2P) can be applied to the impacts of climate change. Initially developed to respond to gross human rights abuses within states, the concept gained currency in the first decade of the new millennium. Based on the understanding of sovereignty-as-responsibility, R2P places the responsibility to provide for the security and well-being of citizens on individual states. The residual responsibility of the international community is only activated if states are not able to offer adequate protection to their populations. In this dissertation, two separate approaches are employed to analyse the application of R2P to the issue of climate change: subsumption and extension.

Firstly, the dissertation examines whether states that contribute to climate change can be held responsible for one of the crimes under R2P, namely genocide, war crimes, ethnic cleansing, and crimes against humanity. The applicability of the first three crimes can be quickly rejected. The thesis then posits that the emitters of greenhouse gases cannot be tried for crimes against humanity because by affecting only a random assortment of victims, the civilian population does not constitute the 'primary object' of their attack. However, using the 2008 cyclone Nargis in Myanmar as a case study, the thesis asserts that states that fail to protect their populations from humanitarian catastrophes linked to climate change might be tried for crimes against humanity.

The second section of the thesis is devoted to analysing a potential extension of R2P to the impacts of climate change. The dissertation presents two different scenarios to assess the potential duties of states: extreme humanitarian catastrophes linked to climate change and a general obligation of states to mitigate climate change. It establishes a framework for R2P and its three components, 'prevent, react, rebuild' that is applicable to climate change. This analysis reveals that reactions to humanitarian catastrophes linked to climate change perfectly accords with the R2P framework. It also appraises the advantages and disadvantages of construing R2P as an instrument to effectively combat climate change. According to the author, R2P is the most promising approach that currently exists which can guarantee adequate protection to people suffering from humanitarian catastrophes linked to climate change. Such a responsibility can be based on the

Abstract

core foundations of R2P: the obligations inherent in the concept of state sovereignty; the responsibility of the Security Council under Article 24 of the UN Charter; and international human rights law, humanitarian law, and national law. On the contrary, a general obligation of the international community to mitigate climate change cannot be derived from the concept of R2P.

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A. Introduction

I. Introductory remarks

*'If climate change makes our country uninhabitable, we will march with our wet feet into your living rooms-Atiq Rahman.'*¹

As early as 1995, Atiq Rahman, a Bangladeshi dignitary, warned of the impending danger of climate-induced migration at the first United Nations (UN) Climate Change Conference in Berlin.² As the latest report of the Intergovernmental Panel on Climate Change (IPCC) indicates, global warming is likely to lead to increased displacement of human populations from their homes.³

In June 2014, New Zealand granted asylum to a family from the Polynesian island nation of Tuvalu.⁴ Claiming to be threatened by climate change, Sigeo Alasana and his family left the island in 2007 for New Zealand. After nearly five years of legal struggle, the New Zealand Immigration and Protection Tribunal finally granted residency to the family. Although the applicants did not receive refugee status under the 1951 Refugee Convention,⁵ the tribunal did consider the humanitarian impacts of climate change in its verdict. This judgement can be seen as a landmark decision because it emphasises that the effects of global warming on human populations could play a major role in the future of immigration legal processes. It also reveals further threats to people around the world exist, although natural catastrophes and climate change do not dominate the public discourse in the way that terrorism or armed conflict do.

1 Atiq Rahman, Speech at the First UN Climate Change Conference (28 March – 7 April 1995), quoted in Tom Athanasiou and Paul Baer, *Dead Heat: Global Justice and Climate Change*, New York (SSP 2002), 23.

2 Parts of this chapter have been published in Franziska Kring, 'Responsibility to Protect Revisited – A Promising Approach to Tackle Climate Change?' in Vasilka Sancin (ed), *Are we "manifestly failing" R2P?* (University of Ljubljana 2017), 261–276.

3 Intergovernmental Panel on Climate Change (ed), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (The Core Writing Team, Rajendra Kumar Pachauri, and Leo Meyer, CUP 2014), 40, 73. Compare also Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30(4) *Law and Policy* 502.

4 Rick Noack, 'Has the Era of the 'Climate Change Refugee' Begun?' *Washington Post* (7 August 2014) <<https://www.washingtonpost.com/news/worldviews/wp/2014/08/07/has-the-era-of-the-climate-change-refugee-begun/>> accessed 1 December 2019.

5 International Convention Relating to the Status of Refugees' (28 July 1951), 189 UNTS 150.

A. Introduction

Climate change is an undeniable reality.⁶ It does not only have direct effects on the global ecosystem but is also known to increase the likelihood of armed conflict. The so-called neo-Malthusian hypothesis states that environmental scarcity increases the frequency and severity of mass atrocities.⁷ Growing populations in developing countries and relative affluence in developed countries leads to rising pressure on natural resources such as land and water, thereby increasing the likelihood of distributional conflicts.⁸ However, because legitimate legal and political institutions are responsible for resolving these conflicts in developed countries, they rarely lead to violence.⁹ Developing countries often lack these institutions, which leads people to try to resolve problems themselves.¹⁰ Against the background of future climate change, the number and severity of environmental conflicts in developing countries will inevitably increase as food systems and rural livelihoods are further strained.¹¹ The high dependence on agriculture and limited adaptation possibilities make the world's least developed and poorest countries particularly susceptible to climate change.

In light of these facts, the international community's¹² inertia to effectively combat climate change calls for reforms of the security system as well as new and innovative

6 The Intergovernmental Panel on Climate Change (IPCC) recently stated that global warming is 'unequivocal'. See Intergovernmental Panel on Climate Change (ed), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (n. 3), 40.

7 Cullen Hendrix, 'Putting Environmental Stress (Back) on the Mass Atrocities Agenda' [2016] The Stanley Foundation Policy Analysis Brief 1, 5; Simon Adams, 'From Global Warming to Genocide Warning: Climate Change and Mass Atrocities' (28 November 2016) <www.globalr2p.org/media/files/from-global-warming-to-genocide-warning.pdf> accessed 1 December 2019.

8 Hendrix (n. 7), 6.

9 *ibid.*

10 *ibid.*

11 Tim Wheeler and Joachim von Braun, 'Climate Change Impacts on Global Food Security' [2013] *Science* 508.

12 This notion of 'international community' is rather vague and requires clarification. Compare Santiago Villalpando, *L'émergence de la Communauté Internationale dans la Responsabilité des États* (Presses Universitaires de France 2005), 10–15; Raphaël van Steenberghe, 'Non-State Actors' in Gentian Zyberi and Kevin T Mason (eds), *An Institutional Approach to the Responsibility to Protect* (CUP 2013), 48. Even in international law, the term lacks a precise definition; it is unclear whether the notion of 'international community' is limited to states, or whether other subjects of international law, such as NGOs, might also be included. Compare, in the sense of the first interpretation, Vienna Convention on the Law of Treaties (23 May 1969), UN Doc. A/CONF.39/27, 1155 UNTS 331, Article 53, referring to '(...) the international community of states as a whole'. On the other hand, in Article 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC does not limit the 'international community' to states. See Report of the International Law Commission on the Work of its Fifty-Third Session (23 April – 1 June and 2 July 2001), UN Doc. A/56/10, Commentary to Article 25, para. 18: 'As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of states as a whole", which is used in the specific context of Article 53 of the Vienna Convention on the Law of Treaties.' Compare also van Steen-