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# Environmentally Displaced Persons

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There are, according to the U.N. High Commissioner on Refugees (UNHCR), approximately 65 million migrants in the world today, more than at any previous time in human history, including the end of World War II. More than 20 million migrants have crossed borders (often in the form of rivers or seas) hoping to find refuge in other countries. As the world knows, these refugees endure extraordinary and life-threatening journeys while seeking formal "refugee" status from the U.N., a status that entitles them to minimum standards of nutrition and health care from the international community and protection from forcible return to the persecution or life-threatening conflicts from which they fled. The remaining 45 million migrants remain inside the borders of their countries, where they are usually referred to as Internally Displaced Persons, or simply IDPs.

IDPs are the orphans of today's world, getting little or no support (and often overt hostility) from their own governments and even less attention than refugees from the international community, which, absent Security Council authorization, can offer them no legal protection and emergency sustenance and health care only where that is permitted, in its discretion, by the local government. While there is extensive international reporting on the challenges faced by refugees and the adjacent and more distant countries that they seek to enter (for example, the European Union), far less attention has been paid to the conditions of these 43 million IDPs, who make up the great majority of the world's migrants, whose conditions are often much worse than those in cross-border refugee camps and whose growing numbers guarantee increasing social instability (and an increasing flow of refugees) for decades to come.

Public discussion to date of both refugees and IDPs has focused, understandably, on three principal issues: the moral responsibility of receiving (and other) countries to accept refugees; the political, economic and social impacts of refugees on those countries; and the security threats posed by the growing number of refugees and IDPs in the Middle East, North Africa and elsewhere, especially Europe. However, outside of academia and the refugee community, there has been little discussion of the crucial relationship between migrants and the environment. This is a significant omission because environmental conditions (especially climate change) are an increasingly important cause of migration within and from developing countries and because migrants communities have significant environmental impacts on their new surroundings, which are often without adequate potable water, waste disposal facilities, vegetation or protection for nearby agricultural uses. Moreover, in the absence of an adequate international response to the needs of refugees and IDPs through moral or diplomatic suasion (or, most recently, military assistance), an environmental perspective on migration might offer new opportunities to address those causes and impacts. This column is an effort to begin that discussion within the broader legal community.

## Environmentally Displaced Persons (EDPs)

There has been considerable debate within the U.N. and academia about how to treat and what to call migrants who leave their homes for environmental reasons. This is because the principal international agreement dealing with migrants, the 1951 Refugee Convention, provides protection only for those cross-border migrants who have "a well-founded fear of being persecuted for reasons of race, religion, nationality,

membership of a particular social group or political opinion" and thus qualify for refugee status. People fleeing poverty—historically the greatest number of today's 65 million migrants—do not qualify for refugee protection and may therefore be denied entry into adjacent countries. Similarly, the millions of civilians fleeing warfare do not have a right, absent a reasonable fear of persecution, to refugee status, though they may qualify for temporary protection until it is safe to return to their home countries. Yet in many cases these economic and conflict-driven migrants are the victims of changing environmental conditions that have given rise to either the immediate economic causes or the civil wars that made rural or urban conditions unlivable. Where those environmental conditions—floods, drought, water pollution, coastal erosion, extreme heat, dust storms, deforestation, urban air pollution, and polluted soils—are the principal or underlying drivers of migration, I believe it is reasonable to call the victims "environmentally displaced persons" or EDPs, a term encompassing both cross-border refugees and IDPs for whom environmental conditions are the direct or indirect cause of their displacement.

To remedy the failure of the Refugee Convention to include economic migrants, some have proposed expanding the definition of "refugee" under that Convention to include all people leaving their countries because of severe economic conditions. Recognizing that this proposal has little chance for support within the European Union (or the United States), others have proposed an entirely new convention dealing only with economic or, more narrowly, climate change refugees. This approach is also a non-starter among nations already chafing under their more limited obligations under the Refugee Convention. Still others have suggested not a new convention but a new "climate refugee facility" under the either 1992 U.N. Framework Convention on Climate Change or the 2015 Paris Agreement in order to assist "climate displaced persons" who are forced into migrant status by the impacts of climate change. While this approach may have somewhat better prospects within the U.N. system, the difficulty of determining who is displaced by climate and who is displaced by poverty has the potential for interminable struggles among relief agencies, donor nations and competing groups of refugees.

While these debates continue, the flow of EDPs and other migrants increases daily, both within and across national borders. In the absence of concerted action by the European Union and North African countries either to stem or accommodate humanely the swelling numbers of migrants seeking to escape drought, famine, civil wars and drug networks across the North African Saheel region, conditions for migrants in Libya have become barbaric, with "slave markets" operating on major migrant routes. After these conditions became publicly known, Italy, France, Libya and Nigeria recently agreed on steps to improve migrant facilities in Libya and on military measures to impede E.U.-bound migrants and return many of them to their countries of origin (the United States has long taken similar action with respect to Haitian refugees in the Caribbean). These actions appear to be motivated less by concern for the humanitarian conditions faced by refugees than by national desires to avoid deepening the security, political and economic concerns of both destination and transit nations. In any event, such short-term responses to migration will do little to address the underlying environmental and other conditions giving rise to EDPs in drought-stricken and war-torn countries.

All this was exacerbated recently on Saturday, December 2, by the Trump administration's extraordinary announcement—insufficiently reported—that the United States was backing out of the ongoing U.N. efforts to negotiate a new Global Compact on Migration to carry out the General Assembly's 2016 "New York Declaration on Refugees and Migrants." That Declaration is an enlightened set of principles, endorsed by the Obama administration, in which the international community condemned anti-migrant xenophobia and pledged to take concerted action to assist all refugees and IDPs, especially women and children, and provide adequate financing for that effort through bilateral, regional and international cooperation. Paragraph 43 of the New York Declaration specifically commits the international community "to addressing the drivers that create or exacerbate large movements" of migrants and to "combating environmental degradation and ensuring effective responses to natural disaster and the adverse impacts of climate change." If implemented, this provision would be the first serious effort to reduce the flow of EDPs in much of the world.

The U.S. withdrawal from this urgently needed multilateral initiative is therefore as grave a mistake as its withdrawal from the Paris climate change agreement earlier this year, and in some respects an even more shameful and dangerous one. Rapidly increasing migration, possibly in the hundreds of millions of EDPs, is now one likely effect of climate change. The failure of the Unites States to help migrants and the

international community adapt to that reality and its potential consequences for the rule of law and fundamental human rights may well be seen by future generations as one of our nation's signal failures and a turning point in human history.

## Alternative Approach: Environmental Impact Assessment

If international (or at least U.S.) action on EDPs is not on the immediate horizon, might it be possible for EDPs to use U.S. and other national laws to address the environmental conditions that force EDPs to migrate? In particular, might the National Environmental Policy Act (NEPA) and its foreign counterparts in the European Union and other developed countries provide a basis for funding or other forms of assistance to help EDPs remain in their home countries, or at least reduce the impact of their relocation in adjacent countries?

NEPA was designed to require U.S. federal agencies to consider the significant environmental impacts of proposed actions before committing to or authorizing such actions. Its application to foreign environmental impacts has always been a source of tension in the federal courts, though the contours of current law are now fairly well established. According to a much-cited 1997 memorandum from the Council on Environmental Quality, federal agency actions that have at least some U.S. environmental impacts and also have significant transboundary environmental impacts are subject to NEPA. In an important 2005 federal district decision (Friends of the Earth v. Spinelli, Civ. No 02-4106, N.D. Cal.), the court applied this principle in refusing to dismiss a claim that the U.S. Export-Impact Bank and Overseas Private Investment Corporation were required to consider the climate change impacts of private development projects they were assisting abroad. Other NEPA cases appear to recognize that foreign plaintiffs can have standing to assert NEPA claims so long as they meet the stringent Article III standing requirements that the Supreme Court has articulated for domestic plaintiffs, including a plausible basis for distinguishing their adverse environmental impacts from those of the general public.

What kind of federal agency action might reasonably be said to have both domestic environmental impacts and sufficiently identifiable foreign impacts to require that agency to consider the impacts of its action on EDPs in other countries? This is a tall order, but there is one currently proposed federal action that might qualify—the Trump administration's proposed rescission of the Clean Power Plan, which was the single most important effort by the Obama administration to reduce U.S. greenhouse gas emissions and thus our nation's continuing contribution to global warming. The U.S. Environmental Protection Agency (EPA) has already recognized its need to prepare an environmental impacts statement under NEPA as a condition to the proposed rescission of the Clean Power Plan, including (as required by NEPA) an analysis of feasible mitigation measures to reduce or avoid the adverse impacts of rescinding the Plan's limits on coal and other fossil fuel emissions. In addition to its domestic impacts, one clearly foreseeable impact of that rescission is the continued acceleration of the environmental conditions in developing countries that are driving EDPs to leave their homes. One feasible way of mitigating that impact is to assist both host countries and IDP communities in their efforts to adapt to those continuing impacts, whether through improved water treatment or waste disposal systems, more climate-resilient agriculture or urban infrastructure or other country-appropriate plans to help IDPs meet basic needs without abandoning their homes. If rescission of the Clean Power Plan is ultimately approved by the EPA, those mitigation measures could, and should, be made a condition to that approval. Indeed, failure to so do so could be challenged by affected plaintiffs both at home and abroad for failure to comply with the EPA's NEPA obligations.

Similar analyses could, and should, be undertaken in the environmental impact assessments performed under other developed countries' domestic laws or by the World Bank, the International Finance Corporation and other public (and private) international lending institutions that carry out environmental assessments when making loans or investments abroad. Many of these projects can, directly or indirectly, exacerbate the environmental conditions affecting EDPs, and measures to mitigate those impacts should therefore be seen as appropriate conditions to their approval.

Such efforts to use domestic environmental laws to assist international efforts to help EDPs are, at best, a stopgap until the international community, including the United States, is able to agree upon and implement a Global Compact on Migration as envisioned by the New York Declaration. In the meantime, there is an important role for U.S. and other national courts to play in enforcing the obligation of their countries'

environmental laws for public agencies and private actors to include an analysis of, and mitigation for, the environmental impacts of their actions on the world's 65 million migrants and EDPs.

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