



**British Institute of  
International and  
Comparative Law**

# **What Role Do Property Rights Play In Climate Change?**

**British Institute of International and Comparative Law**

**Seminar Report**

**Thursday 6 June 2013**

**CHAIR:** Malcolm Forster, Freshfields Bruckhaus Deringer LLP

**SPEAKERS:** Richard Lord QC, Brick Court Chambers; Chris Willmore, Reader, University of Bristol Law School; Professor Philippe Cullet, SOAS Law School; Ezekiel Simperingham, Legal Consultant on Housing, Land and Property Rights.

## **INTRODUCTION**

International human rights lawyers have identified a wide variety of human rights that are being, and likely will be, affected by climate change. These rights range from the right to life to the right to water to the right to free movement and residence, as well as many others. Among those rights less prominently discussed in relation to climate change is the right to property. Yet all three regional human rights treaties recognize the right to property in one form or another. This seminar addressed the role of property rights in assisting States to mitigate and adapt to climate change in a way that respects other human rights. It also explored the implications of climate change for existing regional and domestic property rights frameworks.

## **MALCOLM FORSTER**

In his opening statement, Malcom Forster emphasized the importance of considering the role of private rights in the context of public international law. He opined that the role of private law in international law is one of the forgotten elements of the international legal structure. Looking back on the last four decades of its growth, Public International Law appears to be a cold hearted discipline. As in many areas of international law, we focus on the communal threats, but we tend to overlook the impact of the international principles we are seeking to develop on the rights and interests of the individual. And so the role of property rights in climate change is particularly important given that the impact of carbon emissions on individuals is immediately concerning, far reaching, and enduring.



## British Institute of International and Comparative Law

### RICHARD LORD QC

Richard Lord QC gave an overview of how private law can be used to protect loss of or damage to property.

#### Private rights and climate change

Richard Lord QC started by recognizing the implications of climate change for private and public rights: he gave an example of how the US government has recently revised to at least 50% higher its estimate of how Greenhouse Gas emissions harm the economy when factoring in effects of sea level rise and temperature change.

The potential to use private law to protect or redress damage to private rights first came to Richard Lord's attention as a result of the decision in the case of *Fairchild v Glenhaven Funeral Services*. In that case the House of Lords approved the test of "materially increasing the risk" of harm as a deviation from the more common tests of causation in private tort claims. The principle is that where direct causation of damage cannot be attributed, contribution to the material increase in the risk of damage could suffice to show liability. This has potential value in respect of establishing liability for loss and damage arising out of anthropogenic climate change, where the causal connection between a particular source of emissions and consequent harm is near impossible to prove.

The classic private law concepts of 'damage' and 'causation' apply far beyond the *Fairchild v Glenhaven* personal injury context: they are central to claims for compensation for damage to property. In light of loss and damage caused by climate change, these concepts are becoming central components of relevant policy and legal frameworks.

#### Property rights and the UNFCCC

The first of these frameworks addressed by Richard Lord was the UN Framework Convention on Climate Change (the 'Convention'). It is the primary international forum for developing and applying law in relation to climate change. Article 2 of the Convention emphasizes the stabilization of greenhouse gas concentrations in the atmosphere at levels that avoid dangerous climate change. Its emphasis is on *mitigation*, or abatement, of rising greenhouse gas emissions. The objective of the Convention reflects the paradigmatic approach to climate change in the early 1990s: that climate change could be solved, and damage avoided, through the reduction of carbon emissions. Adaptation to the effects of climate change was off the agenda. To address it in any level of detail was to admit defeat. But progress on mitigation has been too slow and climate change impacts are today a reality. Acknowledgment of this reality has caused a shift of focus onto climate change adaptation and, more recently, how to deal with loss and damage that arises when adaptation is no longer possible. The climate change negotiations are now as much about money as they are about emissions, and have entered a new paradigm of loss and damage liability, insurance and compensation.



## British Institute of International and Comparative Law

Many elements of the international legal dialogue on climate change draw parallels with familiar concepts underlying tort and compensation. For example, 'adaptation' in the climate change context can be seen as equivalent to the private law obligation to 'mitigate' loss. Both terms refer to taking steps to reduce the degree of harm suffered by a prospective Claimant. Similarly, the private law principle of "material increase in risk" (see above) and the UNFCCC principle of Common But Differentiated Responsibilities, or 'CBDR' both relate to the differential contribution of potential Defendants to the damage caused by climate change. There is, as Richard Lord termed it, a "convergence between the private law of fault and negligence and tort and damage, and the principles used by public international lawyers".

### Damage to property

An important feature of the UNFCCC framework are so-called 'response measures'. Response measures refer to those measures that might be taken to combat climate change, for example, decreased reliance on fossil fuels. Petroleum exporting countries will be negatively affected by these measures and demand compensation for their losses. Calculating this loss is a topical issue: Richard Lord referred to a recent publication on 'Unburnable Carbon' (a thesis that states that either all of the remaining fossil fuels reserves will be consumed, leading the world far beyond the threshold for dangerous anthropogenic climate change, or fossil fuel resources are significantly overvalued). Both in the international climate change context as well in domestic private law, the assessment and calculation of loss is a complex but central part of dealing with liability and the infringement of rights.

Discerning damage in the private law context is further complicated by the fact that there is no universal definition. 'Adverse physical damage' is generally accepted as a starting point. But many of the aspects of damage in the context of climate change are more subtle. Damage includes non-economic losses, and losses that arise without there being evidence of physical damage (for example changes in the value of land by virtue of proximity to flood plains). Damage might also depend on additional legal concepts: for example submerging a rock and submerging an inhabited island lead to different types of liabilities. Furthermore, unlike many private law claims, climate change damage cannot be calculated by looking at 'net' change or by application of set-off: damage might occur because of warming *and* cooling. Clearly, as Richard Lord concluded, the concept of damage in the context of climate change is very wide, and gross damage to property rights likely to be substantial.

### Causation

Liability for damage is further complicated by different approaches to causation. To the extent that damage is linked to temperature rise *per se* it may be relatively easy to deal with causation: crops that used to have a yield of X, now have a yield of Y, and, in the absence of other influencing factors, it can be shown that this is due to temperature change. Extreme events raise different, potentially more challenging questions: how can you show that a hurricane that destroyed a house was caused by climate change? To a certain extent lessons from the use of epidemiological evidence in private law litigation can provide useful principles: can emitters be found liable through "material increase in risk" of extreme events? Establishing that point-source emissions create a material increase of risk of damage is likely to



## British Institute of International and Comparative Law

involve complex statistical information: if we are to redress private property damage in this way, is our system of common law sufficiently equipped to deal with the evidential requirements?

### **Responses: liability and property rights**

Having dealt with the difficulties of identifying damage and the complexities of causation, Richard Lord moved on to discuss relevant approaches to preventing or redressing the detrimental impacts of climate change on private property rights.

There are potentially a number of human rights infringed by climate change: for example the right to private and family life, the right to life and the right to subsistence and development. Many modern constitutions, such as that of Kenya, recognize environmental rights that may be impacted by the adverse effects of climate change. And of course, more close to home, Parties to the European Convention on Human Rights enjoy the right to peaceful enjoyment of their property.

However, for the purpose of climate change litigation, establishing the enjoyment of these rights is not without difficulty. What constitutes “peaceful”, “enjoyment” and “possessions” remains the subject of debate. However Richard Lord opined that if your town is flooded, or island submerged, you cannot feasibly have peaceful enjoyment of your possessions.

At the international level, the familiar elements of Article 1 Protocol 1 overlap with, for example, the customary enjoyment of land by indigenous peoples, or the principle of international law that all necessary measures must be taken to ensure that activities in one jurisdiction do not cause damage by pollution to other jurisdictions. At the domestic level there are judicial review challenges, mostly in the United States, against, for example, existing ‘inadequate’ regulation of industry, or otherwise the nonexistence of industry regulation. Many of these challenges have private law aspects: for example in *Kivalina v ExxonMobil Corporation* where private nuisance claims were brought for compensation for damage caused by flooding and sea-level rise.

To date most of these challenges have been unsuccessful or have been stalled, often for many of the reasons already discussed: establishing causation, identifying harm, delimiting rights. But if the current rate of emissions continues (‘Business As Usual’), and if States fail to agree adequate legislation for mitigation and adaptation, private law elements of damage, causation, liability, and compensation will only grow in significance.

### **Responses: risk reduction and insurance**

Richard Lord ended with a consideration of what contribution might be made by the insurance industry. The response of insurers is important for at least two reasons. First is that they are equipped to deal with huge first party damage claims. For example in the case of Hurricane Katrina, houses flattened by the storm in New Orleans were all insured. Second, insurers are equipped to deal with huge liability associated with third party claims (those involving states or companies that have “materially contributed to the risk of harm”). For example, following



## **British Institute of International and Comparative Law**

Hurricane Katrina, attempts to sue carbon emitting companies generally failed. A lesser known action was taken against the US Army Corps of Engineers for failing to build adequate flood levees to protect against sea level surges. The Court was quick to find the Army Corps responsible for much of the damage resulting from Hurricane Katrina, although they concluded that a 1928 Act granted the Defendant total immunity. Third party claims illustrate the significant potential liability of failing to foresee climate change damage and taking precautionary action against it.

There is a third important role that the insurance industry plays in concerns about climate change liability for the infringement of private rights: insurers are experts at identifying risks, predicting potential magnitude of loss, and anticipating possible Claimants and Defendants. But insurers can make both positive and negative contributions to ongoing efforts to tackle climate change. On the one hand, their corporate muscle (potentially even greater than that of energy corporations) provides them with the capability to drive behavioral change. There may be significant positive contributions that insurance schemes can make to helping individuals cope with private property loss. For example the use of Catastrophe Bonds – a private insurance mechanism developed for insuring against unpredictable natural disasters such as hurricanes. Insurers reap the benefit of payments made by property owners who never fall victim to such events, and are able to provide large sums of insurance payouts to those few who are. ‘Micro insurance’ is another innovative insurance mechanism that can be used in developing countries where most of those vulnerable to property damage cannot afford to pay insurance premiums to guard against their loss. Micro insurance is instead arranged by the municipality according to square kilometer patches. If a particular patch is damaged by an extreme weather event, the municipality provides an insurance payout.

On the other hand, insurers are in the business of pricing risk to make their profit, and climate change creates an opportunity to raise premiums. Richard Lord, an expert insurance lawyer, cautioned against the misconception in the UNFCCC negotiations that insurance is the solution to dealing with loss and damage: insurers need to make a profit, and no one, he said, is going to insure Tuvalu if there is a high risk that it is going to be submerged.

### **PROFESSOR CHRIS WILLMORE**

*Professor Willmore discussed the extent to which planning law, a system that regulates the exercise of property rights, can enable or support climate change mitigation or adaptation.*

### **Comparative approaches to planning law**

Commenting initially on the ability to take a comparative approach between planning systems in the UK and abroad, Professor Willmore noted that in most jurisdictions planning law focuses on strategic development of cities and landscapes. By contrast, however, the UK model has developed from detailed regulatory control over individuals’ interests and requirements, with a relatively new strategic approach to planning. One consequence has been that the UK’s planning law system contains detailed provisions relating to the rights of individuals and fewer provisions relating to broader strategic development (which, as Professor Willmore would later



## **British Institute of International and Comparative Law**

explain, are essential for approaching the challenges created by climate change). These differences between the UK's approach and the majority of foreign approaches make a comparative analysis difficult.

### **Planning law and human rights**

From this premise, Professor Willmore described a number of potential comparative observations in relation to property rights within different planning law systems. For example, she described how the relationship between the regulation of property and human rights differs between, on one hand, the United States' "Takings Clause" under the 5<sup>th</sup> Amendment, and, on the other hand, the European Union's Article 1 of the First Protocol ('A1FP') to the European Convention on Human Rights. The Takings Clause occupies a much more significant legal and political space than A1FP, the result being that in Europe there is much greater freedom for policy makers to create planning legislation whereas in the United States, planning policy is much more likely to trigger breaches of the 5<sup>th</sup> amendment.

The significance of this example, as Professor Willmore explained, is that it shows that in different jurisdictions, property rights play different roles in terms of the space they leave for land use regulation. This in turn affects the impact that planning law can have in relation to reducing greenhouse gas emissions and protecting property rights from climate change impacts.

### **Structural limitations to using planning law to protect property rights**

In a planning system like the UK's – one of the most complicated in the world – there are limits to the changes that can be made to deliver transnational obligations such as those that might be required in the context of climate change. Even small changes in planning regulations can have major implications. Professor Willmore gave the example of domestic implementation of Strategic Environmental Assessments requirements under European Directive 2001/42/EC and the impact of the St Albans litigation on the UK's planning agenda. It is potentially misguided, therefore, to assume that the UK's planning law system can contribute to the effort to mitigate and adapt to climate change (see for example the Stern Report that says that "land use planning is essential to meeting the UK's climate change obligations"). In reality, the planning law system in the UK may be of limited value.

Indeed this may also be true of European planning law. As Professor Willmore first observed, comparative regulation of the exercise of property rights is highly complicated given that one cannot compare like with like. Occasionally the EU has looked at whether it can develop EU wide planning regulations because, for example, land use planning has an impact on the economic level playing field. Yet the absence of EU land-use Regulations is telling: because of the difficulty in finding a unified approach to planning law, the EU has ultimately resorted to Directive-based approaches.



## British Institute of International and Comparative Law

### Positive contributions that can be made by planning law policy

Having established these limitations of developing UK and EU Planning Law in relation to the protection of property rights from climate change impacts, Professor Willmore began to look at opportunities. To begin with, all Member States recognize climate change 'mitigation' as the means to reduce the impact of climate change on (*inter alia*) property rights through the reduction of Greenhouse Gas Emissions, and 'adaptation' as enabling responses to the impacts of climate change. Some jurisdictions make a direct link between land use and climate change through strong statements in their land use planning systems.

Until 2004, the UK had a planning system void of any single purpose statement. After 2004 a purpose statement was adopted that linked land-use policy decisions with obligations relating to Sustainable Development. More recently the statement has developed to include duties on Ministers to have in place policies that contribute to the mitigation of and adaptation to climate change impacts.

While it is true that not all EU Member States have such strong policy statements, almost all have a statement about the relationship between development "zoning" and Sustainable Development. Because of its strong policy statements in the national planning policy framework, the UK should be a key player in planning decision-making. Professor Willmore identified the following areas where the UK's planning system could, at least in theory, have a positive impact: mitigation, in particular energy supply, energy demand planning, including travel and transportation, and building efficiencies; and adaptation, in particular from flood risks, coastal erosion, and heat sinks.

### Intrinsic limitations to using planning law to adapt to and/or mitigate climate change

While there may therefore be scope for the planning law system to have a positive impact in respect of the broader climate change agenda, Professor Willmore emphasized that it is important to keep in mind the purpose of the planning law system, and the true extent of any positive contribution it can make. She made five observations in this regard.

1. *Climate change will be only one of many 'factors' affecting land use*

The planning system operates to manage conflicting demands for land use. When planning systems incorporate "climate change" (for example through their policy statements), it is added to a list of factors that will affect decisions on land use: it becomes *a* factor, not *the* factor, and it cannot be expected to automatically override other considerations.

2. *Planning law does not alter existing use of the land*

Planning law is triggered by land-use change: it does little to alter ongoing land-use. Most jurisdictions will define exactly what constitutes land use 'change'. For example, planning law is not relevant to disaster events. Nor is it relevant to short term behavioral change: European law on emissions from vehicles realizes a substantial change in a ten year period because people tend to change cars every ten years and will opt for a more efficient



**British Institute of  
International and  
Comparative Law**

model in the next purchase. By contrast, most people do not make changes in land use on a similar time scale. We are left, as Professor Willmore put it, with the “irony that planning law is most effective in respect of climate change mitigation and adaptation when you have more rapid and extensive development”.

*3. Planning law operates on a shorter timeframe*

The temporal scope of planning law systems simply does not match the 2020 – 2050 targets set by the parties under the UN Framework Convention on Climate Change for reducing domestic emissions. Strategic planning in the UK may, at best, take into considerations relating to 2020, but 2050 is beyond the timeframe of any strategic planning policy in the UK. Climate change targets and timeframes for emissions mitigation are therefore totally mismatched with a planning system that extends, generally to 15 years ahead.

*4. Planning law does not account for behavioral change*

Climate change action is focused primarily on behavioral change, not land use change. Climate change ‘resilience’, for example, is not something that planning law is able to tackle. Resilience relates to the abilities of communities to adapt to the impacts of climate change. Planning legislation does not consider the social and physical abilities for communities to adapt, it simply assumes adaptation is possible or will occur. There is no scope in the planning law framework for considering differential abilities to cope with climate change.

*5. Strategic approaches are poorly accommodated by planning law alone*

Finally, given the need for holistic strategic approaches and the limitations of the UK’s planning law framework in this regard, piecemeal changes in legislation cannot, in isolation, provide sufficient protection against climate change impacts. Take, for example, flooding and flood risk protection: if an individual’s land is marked up as being located in a flood zone, obtaining planning consent will become near impossible. On one hand this is a positive protection by the planning system against development on vulnerable land, but on the other hand, there will be for that individual, a significant loss in the value of land. There is at present no process for mitigating this loss: property rights, protected from climate change become property rights infringed in other respects.

Take another related example: through piecemeal legislative changes that do not take a more strategic approach to the protection of property rights affected by climate change, those living in flood risk areas may be subsequently displaced and moved elsewhere, often to areas that are poorly connected by public transport. In this respect, not only does planning legislation fail to mitigate the cause of climate change (and reduce the threat of flooding in the first place), but this ‘adaptation’ response seems to transfer social and physical problems, not solve them.



## **British Institute of International and Comparative Law**

### **Conclusions**

The conclusions of Professor Willmore were clear. We must be wary of overstating what planning law can do to contribute positively to efforts to tackle the cause and deal with the consequences of climate change. In particular, planning law is triggered by change in land use, and not by existing practices. This has an important consequence: planning law gives priority to adaptation to external changes in the environment that affect land use; it can be of limited value in respect of altering the existing use of the land and thus mitigating the cause of climate change in the first place. Ultimately, we should be wary of trying to use a legislative system that is ill suited to the problem we are seeking to solve.

### **PROFESSOR PHILIPPE CULLET**

*Professor Cullet discussed international and national approaches to water resources including property rights and broader water governance.*

### **Introduction: the impact of climate change on water**

Water is one of the major resource cycles impacted by climate change. It is a resource cycle that is intrinsically linked with the Earth's climate, and the rise in carbon emissions will see a number of significant detrimental changes to the water cycle. Professor Cullet began his presentation by pointing out that the effects of climate change to the water cycle will include, for some, reduced availability of water and increased physical water scarcity (often the premise of international and domestic water policy). But it will also include sea level rise and consequent impacts on water salinity, water logging, salting, flooding and precipitation. In short, as Professor Cullet explained, we need to consider both decreased *and* increased water availability: the whole water cycle will be affected by climate change.

### **International legal frameworks protecting rights to water**

UN Framework Convention on Climate Change is very limited in its consideration of water. Although the effect of climate change on water has been recognized over time, it remains but a side issue in the negotiations. This is a significant gap in the international legal architecture: not only is the climate change debate slow to recognize the impact on the water cycle, but the Convention has yet to make a link between climate change, water and property rights. For this reason, the climate change regime is not where we find major developments in the right to water.

Instead, rights to water are structured around Sovereign Rights, premised on the basis that natural resources are owned by the sovereign State in whose territory they are found. The International Law Commission, for example, has drafted a set of articles based on the assumption of full sovereignty over ground water. But this is an ill-fitting framework for a geological, transboundary water cycle, particularly when considered in light of environmental



## British Institute of International and Comparative Law

concepts such as the Common Concern of Humankind that underlie much of international environmental governance.

There are other areas of international environmental law with stronger water content: the no harm principle, elaborated by the ICJ in the nuclear weapons Advisory Opinion has been repeated in the context of dams and rivers (see the case concerning the Gabčíkovo-Nagymaros dam (*Hungary v. Slovakia*) and most recently in the case concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*)). There are also relevant multi-lateral environmental treaties, such as the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. While the right of a State to enjoy its watercourses is protected by the Convention, it does not extend to protection of private rights to water or the recognition of water as a Common Concern of Humankind.

Other areas of international law recognize a human right to water: over the last two decades there have emerged at least two different human rights treaties that establish a right to water. Given how recent these developments have been, the exact *content* of these rights is not clear nor well established. Rather, the content of the right to water has been elaborated through interpretative statements, general comments, or soft law. According to Professor Cullet, we therefore know there is a human right to water, but we do not know that the implications of climate change will be for property rights over water. Professor Cullet also described an emerging recognition of a *fundamental* right to water, including a duty to provide water. But there is little concrete analysis that provides specific content to this right, or that makes it relevant on a daily basis.

### **Domestic legal frameworks protecting rights to water**

Turning next to the national level, Professor Cullet explained that in most countries, water law has developed around principles of appropriation in the development context. This is particularly true in the case of countries relying heavily on irrigation. For example in India, the State has asserted strong sovereign-like rights to water in the context of irrigation laws. This, according to Professor Cullet, is a remnant of colonial rule when irrigation was seen as part of the development machinery.

Beyond the State level, there are also individual property rights. So-called Riparian Rights are often modeled on those first established in the UK with respect to surface water (the right to use without appropriation), and ground water (drawing from 19<sup>th</sup> Century rights giving ownership rights to land owners). The riparian rights approach has a strong property focus in respect of access and control over water, but very little that provides content to the management of water as an environmental resource. This may prove problematic in the UK as climate change creates stresses on the hydrological cycle and interferes with the enjoyment of rights to use or own water resources.



## British Institute of International and Comparative Law

### An emerging water law?

Professor Cullet criticized what he considers to be an unconsolidated, uncoordinated and fragmented international and domestic water law. We derive little guidance from legislative frameworks and at all levels see a lack of coordination, let alone recognition, of the connection between *rights* over water and *management* of water. These elements are both equally important in the context of a changing climate. What emerges are parallel systems of law operating without coordination: the riparian rights to an aquifer are distinct and separate from management of rainfall, flooding or drought, which may further be distinct from policies relating to development and health. These gaps will be exacerbated by climate change.

According to Professor Cullet, the missing element in the international and domestic legal frameworks is recognition of the *global* water cycle. A systemic, ecological approach to water law is entirely missing. While the UNFCCC is the most appropriate forum to address water as an integral component of the Earth's climate system, Parties have failed to give the issue the attention it requires. For Professor Cullet there is a simple explanation: in order to provide an adequate and effective water law, there would need to be a paradigm shift in the legal approach to water. This would require moving away from sovereign rights and territorial governance and recognizing water as a public good, part of the Common Heritage of Mankind.

### Conclusions

Professor Cullet concluded his presentation with a discussion of more recent developments in the water sector. In the last couple of decades there have been important developments in domestic water policy. Firstly there has been a recognition of water as an economic good rather than a purely social good, with the implication that water should be used more efficiently in order to address increasing physical scarcity. In practice, this will require strengthening of individual property rights. Secondly, there has been the introduction of tradable water rights – the establishment of *new* forms of property rights over water in the sense that rights to tradable water must necessarily be distinct from rights to land.

While these two responses strengthen property rights, they will never be by themselves adequate for meeting the needs of climate change adaptation to changes in the hydrological cycle. Although the human right to water is increasingly well established and may be attributed to those suffering from water scarcity or excess, there is no mechanism for ensuring that the *fundamental* importance of this right ensures that it prevails over other riparian rights. At the heart of approaches to water and climate change must lie principles of precaution and of equity. Neither international nor national legal frameworks have made these principles a priority, either in terms of water or in respect of broader climate change.



## British Institute of International and Comparative Law

### EZEKIEL SIMPERINGHAM

*Ezekiel Simperingham discussed the impact of climate change on migration at both the domestic and international level.*

#### Identification of 'climate migrants'

Ezekiel Simperingham began by setting out the context of his presentation: since the 1990s there has been increasing recognition that human mobility will be significantly affected by climate change. This will be for a number of reasons, including loss of housing, land and property, loss of livelihoods, and fresh water shortages – factors that will in turn trigger population movement. That movement is increasingly understood to take a variety of forms:

- Voluntary vs involuntary
- Movement across vs movement within borders
- Temporary vs permanent
- Spontaneous vs planned

As the reality of climate change loss and damage rises to the fore of international and domestic policy making, the issue of 'forced migration' attracts increasing attention and concern.

#### Scope of the problem

This concern centers on the magnitude of the displacement and the lack of protection and options under international law. Various commentators have made predictions of 50 million to 1 billion forcibly displaced persons because of climate change. At the lower end of this scale (the figure 200 million people is commonly cited) there will be five times the current global populations of all forced migrants.

These figures are, however, somewhat contentious: for example, there is no commonly agreed upon definition of what is a *climate displaced person*, so it is not exactly clear who these estimates are counting and whether they are counting the same individuals. Defining what we mean by a *climate displaced person* is one of the major stumbling blocks to delimiting or establishing an effective governance structure over forced migration. For example, it is difficult (though not impossible) to prove the causal link between climate change and an individual's specific displacement due to, for example, an extreme weather event as it is not certain that that event was linked to climate change. Similarly, where displacement occurs because of slower onset changes, the decision to move will be determined by the individual's socioeconomic circumstances and their ability to cope or adapt to climate change. In these cases, climate change is an amplifier of existing vulnerabilities rather than the sole driver.

In Ezekiel Simperingham's view, the most reliable estimate of climate change displacement come from the international displacement monitoring centre. In 2000 alone, the centre found that 98% of displacement occurred because of climate or weather related events, with 90% being from developing countries. Among the range of factors causing these migrations were



## British Institute of International and Comparative Law

famine due to drought as well as flooding of land and property.

### **What international law is available?**

Ezekiel Simperingham turned next to what existing international law is relevant to the need to protect climate displaced person.

#### *1951 Refugee Convention*

Many people assume that the 1951 Refugee Convention will protect climate displaced persons. This is not the case. The Convention applies to those people already outside their country of origin. Furthermore, in order to be recognized as a refugee an individual must show a *well-founded fear or persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that*. It is difficult to fit climate change within this definition, and even if were possible, it would be difficult to show that the individual was specifically at risk for the five reasons listed under the Convention. The Convention is indiscriminate and as a result it cannot accommodate climate displaced persons. It is for this reason that the term 'climate refugee' is wrong in law and has the potential to undermine efforts to identify how the international legal system can protect climate displaced persons.

#### *International Covenant on Civil and Political Rights*

Articles 6 and 7 of the International Covenant on Civil and Political Rights are also relevant: the right to life and freedom from torture or to cruel, inhuman or degrading treatment or punishment. The vast majority of climate displaced persons, however, will not be able to prove that their life or humane treatment is threatened by climate change.

#### *Guiding principles to Internally Displaced People (IDPs)*

These principles include persons fleeing from natural or man-made disasters, but it is not clear that the Principles apply to those fleeing slower onset effects, such as drought or desertification. In any event the Principles, although not legally binding, provide protection during displacement and provide protections for return and resettlement. They recognize that IDPs are entitled to a full set of rights in a state and should not be discriminated against because of their status. Thus IDPs are rights holders as much as other rights holders in their country and have a legitimate expectation of all their rights, including housing rights and property rights. The Principles are readily applicable to climate displaced persons: they seek to ensure adequate housing, tenure, no arbitrary eviction, peaceful enjoyment of possessions, and restitution following displacements. In their totality, these Principles inform a wide cross section of legislative policy and practical decisions for climate displaced persons in their territory.



## **British Institute of International and Comparative Law**

### **Practical considerations**

To assist with enabling a better understanding of what it means to be a climate displaced person, Ezekiel Simperingham described the problems facing vulnerable communities in Bangladesh. These communities live in the most climate vulnerable country on Earth: there are regular natural hazards; 25% of the country is inundated by flood water every year; 60% of the country may be flooded in severe years; and severe weather events tend to occur every 3-4 years, bringing storm surges up to 7 metres high. This in turn leads to loss and destruction of housing, land and property, and widespread displacement across the country. The effects of climate change are expected to exacerbate many of these existing hazards and create new drivers of displacement: increasing frequency of cyclones, monsoon rainfall, glacier melt leading to higher river flows, lower, erratic rainfall in the north and west, drought, sea level rise submerging low lying areas and causing saline intrusion into rivers and aquifers reducing fresh water availability. These effects will disproportionately affect the poorest and most vulnerable 50 million that already live in poverty.

The Bangladeshi Government is well aware of the looming crisis. It predicts 20 million people will be displaced in the next 40 years from sea level rise alone. Yet there is still no comprehensive international or national mechanism to provide support to people losing housing or property as a result of natural hazards. Instead, people are left in the situation of choosing to move to slums near Dakar, or forced to remain in vulnerable isolated locations where communities have suffered multiple displacements in a single lifetime and are trapped in a cycle of poverty where they lose more and more with each displacement.

One of the key obstacles for Government is the apparent lack of land for relocation in Bangladesh – it is a country already severely overpopulated. Alternative options include relocation to Western countries that may or may not have a moral obligation to accept climate displaced persons as ‘climate refugees’, or are willing to offer them training so that they can become highly skilled migrants. This is unlikely in the short term. Instead, solutions for the Bangladesh climate displaced persons must be found closer to home, leaving international and regional efforts to progress, as they currently are, without the necessary sense of urgency or priority.

### **Solving the protection gap**

As the Bangladesh example demonstrates, those displaced internationally face a serious protection gap: there is no right to remain nor to seek protection in a host State. Different proposals include negotiating a new treaty, agreeing a draft amendment to the 1951 Convention or to the UNFCCC. These are unlikely to gain support in the short or intermediate term. Another option is to develop soft law principles, such as the Guiding Principles on Climate Displaced Persons.

For those displaced internally, while there is greater protection through human rights and guiding principles, more effective rights based national protection policies are needed. For example in Bangladesh, a specialist displacement initiative, “Displacement Solutions”, focus on the search for domestic land solutions to relocate people. Displacement Solutions recently completed three land studies that addressed land availability across the country and identified



**British Institute of  
International and  
Comparative Law**

land suitable for potential relocation of climate displaced persons. However, implementation has not had a positive history and has not been shown in the past to provide truly durable solutions, for example because livelihoods are lost during the course of migration and there may be insufficient rehabilitation of income or subsistence. The land studies also revealed other challenging dimensions of trying to implement solutions on the ground: while in Bangladesh there is land available under Government control that would otherwise be suitable for relocating displaced communities, much of it is illegally occupied by political or business interests that enjoy a higher political prioritization by the Bangladeshi Government.

**Conclusions**

There are challenges and complexities to ensuring human rights protection, including the protection of housing, land and property rights. At both the international and domestic levels there must be clarification of existing law, and negotiation of new frameworks to strengthen and respect the rights of climate displaced persons. In both cases raising awareness of climate displaced persons and the problems that they face is an important first step.

**FINAL THOUGHTS**

Overall, the discussions identified significant gaps in the international and domestic legal architecture for the protection of property rights from the adverse impacts of climate change. This included protection through common laws on tort, through legislative planning law, through the identification of fundamental rights to subsistence (such as in the case of water), and through the protection of those who are forced to give up their property rights and migrate. These gaps, and the apparent difficulty of addressing them through existing legal frameworks, are to be expected: climate change poses new, complex problems that often require holistic approaches that cannot be addressed solely through incremental legislative changes or litigation. What was clear from this event was that we are in an era where climate change loss and damage of private and fundamental property rights is a profound current and immediate future threat. These issues are rising to the fore of work on climate change, and there is increasing motivation to find long-term solutions.

**This report was prepared by Nicola Peart**

**For further information on this seminar please contact Lara Blecher on  
[l.blecher@biicl.org](mailto:l.blecher@biicl.org)**