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## TOW ENVIRONMENTAL MIGRANTS IN THE INTERNATIONAL REFUGE LAW AND HUMAN RIGHTS: AN ASSESSMENT OF PROTECTION GAPS AND MIGRANTS' LEGAL PROTECTION

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*The concept and the rights of environmental refugee have attracted national, international governance and scholars' attention. I have tried to analyses through descriptive and explanatory approach the current trend of environmental refugees' legal protection and its limitation and achievement. Thus, the objective of this research work is first to review legal scholars' work, relating to environmental refugees to show the current trend, relating to environmental refugees protection. Second, to analyse the existing legal framework to show, whether it adequately has governed the issue of environmental refugees' rights and identify the gap. Third, it explains the ways forward. The international refugee law (the 1951 refugee convention and the 1969 OAU refugee convention), the international environmental law, international law on Stateless persons, the international human right law and the system of temporary protected status. Environmental refugees could be referred otherwise as environmental migrants, environmentally displaced persons, climate refugees, climate change refugees, environmental refugees and ecological refugees, thus it implies the same thing in this context. The legal concepts are making that definition, such as well-founded fear, persecution, crossing international border, exclusion from refugee status (undeserving cases), and cessation of refugee status. The UN High Commissioner for Refugees state that 36 million people were displaced by natural disasters in 2009, and about 20 million of those were forced to move for climate change-related issues. According to other estimates, there could be as many as 150 million by 2050. In accordance with the estimates of UN Environment Programme, by 2060 there could be 50 million environmental refugees in Africa alone*

**Keywords:** Migration, Environmental, Refugee, Law, Unhcr, International law, Rights, Protection and UN

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### 1. Introduction

The issue of environmentally displaced persons' rights, in the refugees' rights sense, was for the first time addressed in 1970s and 1985 [1]. The concept of environmental refugees was introduced by Lester Brown of the World-watch Institute in the 1970s [1]. It entered into common usage after a 1985 United Nations Environment Program policy paper, entitled 'Environmental Refugees [1]. Until that momentum, although environmental factors were the cause for many of the migrations, it has not got international, domestic governments' and scholars' attention. Since recently, however, the concept and the rights of environmental refugee have attracted national, international governance and scholars' attention [2]. Thus, whether the current international and national legal frameworks have covered and granted those rights of protection, the legal research question has come to be essential. In this research work, I have tried to analyse through descriptive and explanatory approach the current trend of environmental refugees' legal protection and its limitation and achievement. Thus the objective of this research work is first to review legal scholars' work, relating to environmental refugees to show the current trend, relating to environmental refugees protection. Second, to analyse the existing legal framework to show, whether it adequately has governed the issue of environmental refugees' rights and identify the gap [3]. Third, it explains the ways forward. The important legal documents, discussed in this research work include: the international refugee law (the 1951 refugee convention and the 1969 OAU refugee convention), the international environmental law, international law on Stateless persons, the international human right law and the system of temporary protected status[4].

### 2. Literary review

**Environmental Refugee.** Environmental refugees could be referred otherwise as Environmental migrants, environmentally displaced persons, climate refugees, climate change refugees, environmental

refugees and ecological refugees. Thus, it implies the same thing in this context. In order to answer this question, it is quite appropriate to define and explain the definitional elements of environmental refugee and refugee.

**Definition.** The term ‘environmental refugee’ was first coined by Essam El-Hinnawi in a 1985 United Nations Environmental Programme report and he defined it as [5, 6]: those people, who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [2]

The other most well know definition derives from the British environmentalist, Norman Myers. He described environmental refugees as “persons, who no longer gain a secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought, desertification, deforestation, soil erosion, water shortages and climate change, also natural disasters as cyclones, storm surges and floods”.

The Office of the United Nations High Commissioner for Refugees has moved towards a definition of ‘environmentally displaced persons’ as those: “who are displaced from or who feel obliged to leave their usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as a result of adverse environmental, ecological or climatic processes and events”.

El Hinnawi (1985:4 in Bates 2002:466) defined environmental refugees as: “those people, who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic]. By ‘environmental disruption’ in this definition is meant any physical, chemical, and/or biological changes in the ecosystem(or resource base) that render it, temporarily or permanently unsuitable to support human life.

Jacobson (1988:37-38) identified different types of environmental refugees: Those, displaced temporarily due to local disruption, such as an avalanche or earthquake. Those, who migrate because environmental degradation has undermined their livelihood. Those, who resettle because land degradation has resulted in desertification or because of other permanent and untenable changes in their habitat.

Therefore, from these definitions mentioned above we could conclude that these are persons, displaced and migrated because of environmental reasons: natural or anthropogenic. The concern of all the scholars in defining the term was displacing of persons and not the time or where they are living now. Hence, whether these persons are refugees will be the next question that needs answer.

**Whether Environmentally Displaced Persons have the Right to get refugee treatment under the 1951 convention.** The definitio for the term refugee is provided under Article 1(A) of the 1951 Convention, relating to the Status of Refugees, amended by the 1967 Protocol, relating to the Status of Refugees (hereafter referred to as the Refugee Convention), which states that a refugee[6] is any person who: owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, unwilling to avail him/herself of the protection of that country; or who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. Thus, as we can understand from this definition, environmentally displaced persons and refugees, although both are displaced and share common features, are somehow different. And hence whether this environmentally displaced persons can have refugee status to get international protection is the question that shall be addressed to make the distinction very clear [7].

**Determination of Refugee Status at the International Level: Criteria and Procedure.** Recognizing the refugee status of an asylum seeker involves two requirements as per international law: substantive and procedural requirements [8]. In this first section, I shall consider the definition of a refugee, the legal concepts, making that definition, such as well-founded fear, persecution, crossing international border, exclusion from refugee status(undeserving cases), and cessation of refugee status. In the second section, I closely consider procedural issues, involved in the course of determination of refugee status. Some of these procedural issues include: who bears the burden of proof, shared responsibility, standard of proof, assessing evidence, credibility and procedural safeguards [1].

**Substantive Requirements (Criteria).** Refugee status, on the universal level, is governed by the 1951 Convention and the 1967 Protocol, relating to the Status of Refugees [9], the two international legal instruments that have been adopted within the framework of the United Nations. These two international legal instruments are applicable to persons who are refugees as therein defined. The assessment as to who is a refugee, i.e. the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee applies for recognition of refugee status. Both the 1951 Convention and the 1967 Protocol provide for co-operation between the Contracting States and the Office of the United Nations High Commissioner for Refugees. This co-operation extends to the determination of refugee status, according to arrangements made in various Contracting States [10]

**Definition of Refugee.** According to Article 1 A (2) of the 1951 Convention the term refugee shall apply to any person, who [11] as a result of events, occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular so-

cial group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail him/herself of the protection of that country; or who, not having a nationality and being outside the country of his/her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, [12, 13] “Events, occurring before 1 January 1951” – as shown before, this dateline has been removed by the 1967 Protocol and thus lost much of its practical significance. An interpretation of the word “events” is therefore of interest only in the small number of States parties to the 1951 Convention that are not also party to the 1967 Protocol. The word “events” is not defined in the 1951 Convention, but was understood to mean happenings of major importance, involving territorial or profound political changes, as well as systematic program of persecution that are after-effects of earlier changes. The dateline refers to events, as a result of which a person does not become a refugee, nor does it apply to the date, on which he/she left his/her country. A refugee may have left his/her country before or after the datelines, if his/her fear of persecution is due to “events” that occurred before the dateline or to after-effects, occurring later as a result of such events. There are other more elements that underscore, but are not discussed here [14]. These includes well-founded fear of persecuted, persecutions, discrimination, punishment, consequences of unlawful departure or unauthorized stay outside the country of origin, economic migrants as distinguished from refugees, agents of persecution, for reasons of race, religion, nationality, membership of a particular social group or political opinion[15], or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. Dual or multiple nationalities Article 1 A (2), paragraph 2, of the 1951 Convention [16].

**Procedures for the Determination of Refugee Status.**The 1951 United Nations Convention, relating to the Status of Refugees, and the 1967 Refuge protocol do not specify the requirements for refugee status determination procedures [17]. Different jurisdictions have developed varied refugee status determination procedures, which serve the common objective of deciding on the claim of asylum seekers [18]. These basic requirements, which reflect the special situation of the applicant for refugee status, would ensure that the applicant is provided with certain essential guarantees, are the following, (i) The competent official (e.g., immigration officer or border police officer), to whom the applicant addresses him/herself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases, which might come within the purview of the relevant international instruments[19] He/she should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.

(2) The applicant should receive the necessary guidance as to the procedure to be followed.

(3) There should be a clearly identified authority - wherever possible a single central authority with responsibility for examining requests for refugee status and taking a decision in the first instance.

(4) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his/her case to the authorities concerned. Applicants should be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.

(5) If the applicant recognized as a refugee, he/she should be informed accordingly and issued with documentation, certifying his/her refugee status.

(6) If the applicant is not recognized, he/she should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

(7) The applicant should be permitted to remain in the country pending a decision on his/her initial request by the competent authority, referred to in the paragraph.

(8) Above unless it has been established by that authority, that his/her request is clearly abusive. He/she should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending. The Executive Committee also expressed the hope that all States parties to the 1951 Convention and the 1967 Protocol that had not yet done so would take appropriate steps to establish such procedures in the near future and consider UNHCR participation in such procedures in appropriate form. There are also other elements, which are very controversial and prove of which is difficult. These includes: Burden of proof: a shared responsibility, the standard of proof, Assessing evidence and the link to credibility, absolute Credibility v. Overall Credibility, and the benefit of the doubt. These complex procedural issues need deep analysis.

### 3. The aim of the study

The aim of the study is to analyze the International Convention on the Protection of the Rights of All Migrant Workers and their Families, as it may offer protection to some, who have crossed borders in the context of climate change.

To accomplish the aim, the following tasks have been set:

1. To study the impact of the International Environmental Law.
2. To study the impact of International law for human rights

#### 4. Materials and Methods

While the definition is being debated, it is extraordinary difficult to estimate and calculate the number of environmental refugees worldwide. Different results were obtained by different assessments done. Norman Myers [6], who in 1995 predicted 25 million environmental refugees, stated in 2005 that the impact of global warming could potentially displace 200 million people [20]. According to the International Federation of Red Cross, “climate change disasters are currently a bigger cause of population displacement than war and persecution”. It estimated in 2001 that for the first time the number of environmental/climate refugees exceeded those, displaced by war.

The UN High Commissioner for Refugees stated that 36 million people were displaced by natural disasters in 2009, and about 20 million of those were forced to move for climate change-related issues. According to other estimates, there could be as many as 150 million by 2050. In accordance with the estimates of UN Environment Programme, by 2060 there could be 50 million environmental refugees in Africa alone. From these it is quite clear that the issue of environmental migrants is a hot issue and the world leaders, CSO and scholars shall give focus and come up with legal solution both for the rights of migrants and environmental issue. Moreover, beyond the empiric evidence as shown above, the fact that environment and climate change has come to be the top global legal and political agenda, the fact that the right to clean environment is recognized as fundamental right brings the issue on the hot spot researchable issue [21].

The IPCC stated as early as 1990. The gravest effects of climate change may be those on human migration as shoreline erosion, coastal flooding and agricultural disruption uproot millions. Similarly, the OHCHR has acknowledged that climate change may affect hundreds of millions of people in various ways, including through permanent international displacement [22]. In 2008, the Deputy High Commissioner for Human Rights correspondingly provided: By 2050, hundreds of millions more people may become permanently displaced due to rising sea levels, floods, droughts, famine and hurricanes. The melting or collapse of ice sheets alone threatens the homes of 1 in every 20 people. Increased desertification and the alteration of ecosystems, by endangering communities' livelihoods, are also likely to trigger large population displacements [23]. Accordingly, experts in environmental communities as well as in human rights communities have expressed their concern in the context of environmentally induced migration [24].

#### 5. Result

**International Law on Migration and the Protection of Environmental Migrants.** There are three categories of migration law: international, regional and national. The national migration law regulates the displacement of people at the domestic level while the international law regulates cross border migration/displacement. The regional law refers to the law that applies on the specific regions only. Here the focus of this research is the international migration law. And hence it is discussed as follows [25]

**Cross border migration/displacement and the international legal frameworks.** Cross-border displacement and migratory movements in the context of climate change, however uncertain in scale at the current stage, is already taking place and will likely increase over time, but unlike for internal displaced people (IDPs) no comprehensive normative framework exists. As climate change and disaster-related movement is likely to become more diverse and new patterns will emerge, the question arises as to whether and how the present international law and existing systems of protection already address, or could be used to deal with these new movement patterns [18]. While the existing gaps will be discussed below, the following provides an overview of categories of norms that are contained in international and regional treaties or customary law and potentially apply to those, having moved across borders [26].

**International Refugee Law.** The author of this study therefore holds the position that international refugee law is, by and large, an inappropriate normative framework for responding to the needs of those, forced to migrate internationally on account of environmental impacts [27]. International refugee law applies to persons who have been compelled to flee across borders and provides for a specific status and ensuing status rights. As such, refugee law exclusively protects non-nationals of a state and stateless persons. Refugee is a legal term, defined in the 1951 Convention on the Status of Refugees and its 1967 Protocol as a person, who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail him/herself of the protection of that country. As will be shown below, this notion covers persons, displaced by effects of climate change, in specific cases only. As defined above, environmental migrants can’t be included under these criteria [18, 23].

#### 6. The 1969 OAU Refugee Convention

The 1969 African Convention Governing the Specific Aspects of Refugee Problems in Africa contains the same definition, but then expands it by including every person who, owing to external aggression, occupation, foreign domination or events, seriously disturbing public order in either part or the whole of his/her country of origin or nationality, compelled to leave his/her place of habitual residence in

order to seek refuge in another place outside his/her country of origin or nationality [28] The 1984 Cartagena Declaration on Refugees 103 adds the criterion of massive violation of human rights, the Arab Convention on Regulating Status of Refugees in Arab Countries of 1994 also contains a broader definition of refugee. This broader notion drafted in a particularly interesting way as it encompasses persons, who unwillingly took refuge abroad because of the occurrence of natural disasters or grave events, resulting in major disruption of public order in the whole country or any part thereof.

In Europe, the European Asylum Acquis, in particular the Temporary Protection Directive would need further analysis and political commitment by the EU member States and the Union's organs to be activated. The temporary Protection Directive provides for the possibility of 'giving temporary protection in the event of a mass' influx of displaced persons from third countries, who are unable to return to their country of origin' (Article 1), a notion, broad enough to at least cover some categories of persons, displaced abroad by effects of climate change, even though the non-exhaustive definition of 'displaced persons' (Article 2, letter c) does not mention such environmental situations [29]

**International Humanitarian Law.** International humanitarian law governs situations of international and non-international armed conflict and is therefore of no practical relevance in the protection of persons, moving across borders in the context of climate change. This is also true for scenario 5 above, unless the country of refuge is a party to the conflict [30].

This pronouncement is followed by a list of parties in need of such extra consideration: These are among others small island countries, countries with low-lying coastal areas, countries with arid and semi-arid areas, countries with areas, prone to natural disasters, and countries with areas, liable to drought and desertification. Thus, even though the convention does not mention the rights and needs of the individuals that migrate due to climate change, the convention recognizes that there is a need to take measures and cooperate, especially when it comes to those most affected. The focus is more of a financial one rather than a rights-based one. However, it might be relevant in the context of preventing and supporting countries, affected by environmental migration. Furthermore, the parties to the convention have actually, during the 2011 Cancun Conference, identified environmentally induced migration as an important issue and even agreed to undertake [31].

Measures to enhance understanding, coordination and cooperation with regard to environmentally induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels must be taken. Notwithstanding the significance of this acknowledgement, these measures are voluntary and lack specificity. The result of this lack of specificity is that subsequent adaptation plans and activities, commenced by parties, pay little or no attention to environmentally induced migration. Thus, in practice, the agreements have had little to no impact on the situation for environmental migrants. Although the Cancun agreements neither obliges its signatories to take action, nor stipulates how any such implementation should occur, these agreements should be considered as significant because they embody an international recognition concerning the fact that environmentally induced migration might look very differently and thereby requires diverse responses. Further, it proves that the UNFCCC is a proper forum for taking actions and debating, when it comes to lease financing and supporting environmentally induced displacement, and to raise awareness concerning this widespread issue. These agreements further indicate that the international community is receptive to the addressing of climate migration as an issue within the UNFCCC framework, and to cooperate with regard to it. Nevertheless, even though one might interpret this development as an opening for debate concerning the issue within the UNFCCC framework, the contemporary system is not, for the reasons provided for previously, adequate for offering protection for environmental migrants [18, 32].

**The System of Temporary Protected Status.** Numerous countries have encompassed provisions in their disaster management legislation concerning assistance and protection for people, affected by natural disasters in their country. The EU has similarly developed a system that has the potential of offering temporary protection to some people, displaced due to environmental factors [33]. There is also a circumstantial evidence that states in the past have allowed for and actually received displaced persons on their territory as a temporary measure on an ad hoc basis, such as in the context of a flooding or storm. In these situations, such measures, have taken on humanitarian grounds, not to adhere to obligations, held under a particular domestic law or international treaty. Thus, there are grounds for examining whether there might be a customary international law based obligation to offer temporary protection to people, fleeing environmental disasters, but I don't cover this area now [30].

**International Law on Stateless Persons.** Statelessness could be invoked by the population of low-lying small island states that are heavily affected by sea level rises to the extent that they will end up completely submerged. This is the feature for example in the cases of the islands of Kiribati and Tuvalu, the Marshall Islands, the Maldives, and several Caribbean islands. However, application of the law on stateless persons would require that a state's territory, population or government disappear [34]. It does not extend to the situation of *de facto* statelessness, namely where a person formally has a nationality, but which is ineffective in practice. Yet, the territories of these low-lying islands will become uninhabitable long before the total submersion of the islands. Thus, people will be forced to migrate where there still exist a government in practice. Therefore, the first gap, when it comes to the application of the law on

stateless persons to environmental migration, is that there is a need for protection before there being a complete statelessness and such cases of pre-emptive migration would thus not be covered by the law on stateless persons. Further, even if pre-emptive environmental migrants would have been considered as stateless, the 1961 Convention on the Reduction of Statelessness provides only that it is: 'Desirable to reduce statelessness by international agreement' [35].

Thus, the convention does not provide any enforceable right to a nationality and cannot be materialized into some concrete right to protection under international law. Similarly, the Convention, relating to the Status of Stateless Persons, cannot be considered to offer adequate protection to environmental migrants. [36] The convention only prohibits expulsion of stateless persons, lawfully staying on the territory, except on the ground of national security or public order. This provision might be contrasted with the provision of the 1951 Refugee Convention that instead provides that states: Shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory, where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization [18]. Thus, the law on stateless persons does not offer any right of protection to persons environmentally displaced, even if this group of people would have defined as stateless. It only provides that persons that are already lawfully present in a receiving state cannot be expelled if they have no state to return to [37].

In short, the analysis shows that the following are basic problems:

**Fundamental Protection Gaps.** Having reviewed current international law, there is an evident lack of protection for environmental migrants. There are accordingly several protection gaps under all studied legislations as well as under the system of Temporary Protected Status. First, environmental migrants are not protected under international refugee law because they do not usually experience the sort of persecution that is necessary to fulfill the requirement of refugee. Further, the de-linking of the persecutor from the territory, from which the migration occurs, as would be required to cover environmental migrants by the refugee concept, is unknown to current international refugee law [38].

Second, environmental migrants are not protected under current international environmental law agreements, as these tend to focus on the relationships and rights of states rather than individuals. This system may thus be capable of preventing environmental migration and perhaps of supporting the protection of environmental migrants economically, but does not address the protection of individuals, displaced due to environmental factors [39].

Third, the concept of statelessness does not extend to the situation of *de facto* statelessness as would be required in order to encompass environmentally induced displacement. The definition of statelessness in the 1954 Convention Relating to the Status of Stateless Persons is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether [40]. Fourth, there are today no explicit human rights protections for environmentally induced displaced and little recourse for potential violations. Also, it seems farfetched that the principle of non-refoulement would assist a person, displaced by environmental factors, especially since current jurisprudence put forward that violations of socio-economic rights would be inadequate to find such a protection claim [41]. Fifth, the system of Temporary Protected Status is discretionary and varies significantly among different domestic systems, EU legislation and customary international law [42]. There are also operational and institutional gaps as one consequence of existing legal gaps is the fact that people, moving across borders in the wake of climate-related hazards, may often find themselves in a situation of limbo. However, this is not only link to the lack of appropriate normative frameworks for such persons, but also to institutional gaps in responding to their protection and assistance needs. In other words, no one feels in charge of the persons, who are neither just 'ordinary' migrants nor refugees and thus cannot be identified in terms of status and applicable legal framework. Ad hoc and unsystematic approaches in the operational response bear many risks for the rights of the affected population. A lack of coherent institutional response at the international level, in particular of humanitarian and development actors, may exacerbate the situation of the affected persons. No agency has so far assumed a responsibility for persons, displaced across borders in the context of climate change [3].

This can best be achieved if there is an international mechanism in place, recognizing this category of individuals. In financing the projects, developed nations and nations that contributed to carbon emission shall be under huge obligation to take the responsibility of climate change migrants. Strengthening institutions and policies: the final suggestion is that concepts need to be devised and institutions - reinforced or created in order to be able to assist the flux of forced environmental migrants, both at the international and national levels.

## 7. Conclusion

Based on the above discussion, I recommend in general more research, done beyond research on the area, to make problems of the current legal framework regarding environmental migrants' rights clearer. The following is highly suggested: requirement for strong scientific basis, increasing awareness. It is important to raise worldwide knowledge based public and political awareness of the issue and its en-

vironmental, social and economic dimensions. This step is particularly timely and important, as the debate on migrations is high on the agenda of many countries/regions. Improving legislation: following the two steps above there is then a need to put in either place a framework of recognition of environmental migrants/refugees in a separate Convention or anchor it in Intergovernmental Environmental Treaties. To well articulate and address causes of environmental migration, and establish the legal and institutional frameworks for environmental migration. Specifically make a convention, dealing with environmental migrants and establish the institution, dealing with it and cooperate with states immigration office, regional immigration office etc. Giving the means for adequate humanitarian aid: there is a need to empower the relevant entities in the United Nations system and other major assistance organizations to provide aid to environmental migrants/refugees, particularly when considering the displacement of entire communities.

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