

LEGAL PROTECTION, CLIMATE CHANGE AND MIGRATION

a guide to key resources and research



UK CLIMATE CHANGE AND MIGRATION COALITION

The UK Climate Change and Migration Coalition exists to challenge the lack of long-term strategies to support and protect people at risk of displacement linked to environmental change. Our goal is to ensure a people centred policy response at the national and international level.

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COVER IMAGE

People returning home after being displaced by flooding in Pakistan in 2010. Photo licensed under creative commons, Department for International Development / Russell Watkins.

Introduction

When people move in the context of natural disasters they often find themselves without legal protection. This makes them vulnerable to exploitation at their destination or liable to forced return to dangerous locations. Some existing law, norms and international agreements go some way to protect people who move in this context, however it is clear that gaps in legal protection remain. How to meet this challenge is a controversial and contested area of academic study and advocacy. A number of proposals exist for meeting this challenge.

The document is designed as a guide to that commentary and analysis. The aim of the document is to provide a summary and explanation of some of the key proposals and arguments.

The document does not contain its own proposals or recommendations. Rather it aims to help academics, policy makers and campaigners explore this important area of debate and deepen their own understanding.

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Existing legal protection

The following documents relate to key decisions, international laws, soft law and norms that protect people who move. These documents make up some of the current legal protection for people who move internally or cross border, and either move voluntary or are forcibly displaced. Some people who move in the context of climate change will be protected by these existing laws and norms, however others will not.

UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

Organisations: Office of the UN High Commission for Human Rights and Stateless Persons

Date: 1951 and 1968

Download: <http://ow.ly/lXzzc>

UNITED NATIONS CONVENTION RELATING TO THE STATUS OF ON STATELESS PERSONS

Organisations: Office of the UN High Commission for Human Rights

Date: 1954

Download: <http://ow.ly/lXAdR>

UNITED NATIONS INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

Organisations: Office of the UN High Commission for Human Rights

Date: 1990

Download: <http://ow.ly/lXBJn>

UNITED NATION GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

Organisations: United Nations

Date: 1998

Download: <http://ow.ly/lXC9s>

**THE HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLES IN STATES AND TERRITORIES
THREATENED WITH EXTINCTION FOR ENVIRONMENTAL REASONS**

Organisations: Office of the UN High Commission for Human Rights

Date: 2004

Download: <http://ow.ly/lXC9>

HUMAN RIGHTS COUNCIL, RESOLUTION 7/23. HUMAN RIGHTS AND CLIMATE CHANGE

Organisations: Office of the UN High Commission for Human Rights

Date: 2008

Download: <http://ow.ly/lXH8g>

**COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, RECOMENDATION 1862,
ENVIRONMENTALLY INDUCED MIGRATION AND DISPLACEMENT: A 21ST-CENTURY
CHALLENGE**

Organisations: Council of Europe

Date: 2009

Download: <http://ow.ly/lXli3>

CLIMATE CHANGE AND ITS POSSIBLE SECURITY IMPLICATIONS. REPORT NO. A/64/350

Organisations: United Nations General Assembly

Date: 2009

Download: <http://ow.ly/lXJ14>

CLIMATE CHANGE AND ITS POSSIBLE SECURITY IMPLICATIONS. REPORT NO. A/64/350

Organisations: United Nations General Assembly

Date: 2009

Download: <http://ow.ly/lXJ14>

**THE CANCUN AGREEMENTS: OUTCOME OF THE WORK OF THE AD HOC WORKING GROUP
ON LONG-TERM COOPERATIVE ACTION UNDER THE CONVENTION**

Organisations: United Nations Framework Convention on Climate Change

Date: 2010

Download: <http://ow.ly/lXOzz>

Key research, analysis and commentary on creating legal protection for people who move in the context of climate change

CLIMATE CHANGE NATURAL DISASTERS AND DISPLACEMENT, A MULTI-TRACK APPROACH TO FILLING THE PROTECTION GAPS

Publication: International Review to the Red Cross

Organisations: ICRC

Author(s): Vikram Kolmannskog and Lisetta Trebbi

Date: September 2010

Download: <http://ow.ly/lXzi7>

Human-induced climate change is accelerating and is already having a severe impact, including an increase in certain natural hazards. Further, a study by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the Internal Displacement Monitoring Centre of the Norwegian Refugee Council (NRC) indicates that millions are already being displaced by climate-related natural disasters each year. A number of researchers and international institutions have arrived at the conclusion that climate change will probably contribute to ‘major forced displacements’ over time. The number of recorded natural disasters has doubled from approximately 200 to over 400 per year over the past two decades. The majority are climate-related disasters.

A continuum exists between voluntary and forced migration although there is no framework for determining the ‘push factors’ between these two ends of the spectrum. People leave their homes for a complex set of reasons and there is ‘multi-causality’ even in forced migration. This paper focus on the gaps in legal protection for those forcibly displaced by climatic events and more broadly, natural disasters.

The protection needs of people displaced by natural disasters have not yet been fully explored and understood. This report explores a number of scenarios and found no protection gaps where internal displacement resulted from sudden-onset natural

disasters, and internal displacement as a result of conflict. Both of these scenarios are covered by the United Nations Guiding Principles on Internal Displacement.

For those who cross international borders, Article 1A of the Convention Relating to the Status of Refugees does not generally apply to people driven from their homes by natural disasters, since refugee status is linked to a well-founded fear of persecution. For those who cross international borders due to climatic events there is a gap in legal protection. This report considers the options for filling this gap.

Amending the 1951 Convention Relating to the Status of Refugees

Since many of the people displaced across borders do not seem to qualify as either stateless persons or refugees, some advocates have suggested amending the 1951 Refugee Convention. However, critics, among them the UN High Commissioner for Refugees (UNHCR) and the NRC, argued that any initiative to amend the refugee definition, as set out in Article 1A of the Refugee Convention, would risk a full renegotiation of the Convention. In the current political climate, any renegotiations could undermine the international refugee protection regime altogether.

Inclusion in the United Nations Framework Convention on Climate Change (UNFCCC) or any other climate agreement

In terms of protection for those displaced by climatic events the UNFCCC has little to offer. Historically, there has been reluctance to incorporate human rights issues. However, a climate-change agreement could play a role in protecting people who are migrating or have been displaced. Activities related to migration and displacement qualify for funding in the latest draft texts. Nevertheless, while it is important to recognise migration and displacement and to ensure funding and co-operation, it is unlikely that gaps in legal protection will be negotiated in this forum.

Creation of a new Convention

Although this option is popular with a number of commentators, this report highlights a the following of obstacles: i) establishing causation between climate change and

displacement, especially in the case of slow-onset scenarios; ii) generating sufficient political will to agree and implement a new instrument; iii) the difficulty in justifying protection only for those displaced by climate-related disasters while excluding people displaced by other natural disasters .

Creating regional treaties

Developing regional treaties could be one way to fill protection gaps in the context of climate change and natural disasters. Climate change will certainly affect regions differently hence there may be more political will at the regional level to deal with the varied impact. Further there are already in existence a number of regional instruments which define IDP's and refugees more broadly. However, jurisprudence based on these regional definitions is scarce and applicability to those displaced by climate change not clear.

Context-oriented and dynamic interpretation of existing refugee law

The report firstly considers in what circumstances people displaced by climate events and natural disasters could be covered by the Refugee Convention. Where, for example, the victims of natural disasters flee because their government has consciously withheld or obstructed aid in order to punish or marginalise them on one of the five grounds enunciated within the Convention (race, religion, nationality, political opinion and social group) there is an argument as to the applicability of the Refugee Convention. By way of example, some Somalis in refugee camps in Kenya reported having fled both drought and conflict, and the local UNHCR staff stated that they would not 'split hairs' when drought and conflict coincides. The main challenge for a context-oriented and dynamic interpretation of existing refugee law comes from the general political climate for refugees today. There is no global refugee court and individual countries retain much discretion in interpreting refugee law. As a consequence countries are narrowly defining whom they are prepared to recognise as a refugee. Although the principle of non-refoulement set out in the Refugee Convention prohibits the expulsion or return ('refoulement') of a refugee and is recognised as forming part of customary international law, in practice this is subverted through interception and rejection of prospective refugees at borders.

Context-oriented and dynamic interpretation of existing human rights law

A partial solution may be found in broader human rights law. There may be cases where a person cannot be returned to their country of origin owing to climate change and/or disaster; disappearing island states being an extreme example. In other cases, disasters may affect essential infrastructure necessary for a return. Forced return may also not be allowable because it is considered to breach a fundamental right. The courts have determined that individuals cannot be returned to their country of origin where they face torture, inhuman or degrading treatment. This focus on 'returnability' could offer something of a solution to the challenge of slow-onset disasters and displacement. It is not so much a question of why someone left initially, but rather whether the gradual deterioration has reached a critical point where they cannot be expected to return now. Considering wider human rights such as the prohibition on torture and ill-treatment, and the right to life has the advantage of being open to dynamic interpretation while still allowing the authorities a degree of discretion.

Complementary and temporary protection at regional and national levels

There are already some national and regional temporary protection regimes that could apply. (The United States Immigration and Nationality Act provides temporary protection to certain nationalities. The EU Temporary Protection Directive can be applicable to some cases of natural-disaster-related displacement). The weakness of these regimes is that they do not provide long-term protection to individuals but are a short-term solution for groups of people.

Soft Law approach

Closing the protection gaps by creating a synthesis of existing international law in the form of principles. A precedent for this is the UN Guiding Principles on Internal Displacement which draws on human rights, humanitarian and refugee law as a means of responding to a phenomenon requiring additional protection measures at a

time when there was little political will for a new convention. The report notes that legal basis for similar guiding principles on displacement due to climate change and natural disaster could include all the previously mentioned areas of law – refugee law, environmental law, and human rights law – and go even further by highlighting best practices from different countries and regions.

Multi-track approach

Choosing a combination of the solutions explored above may prove the most effective way of filling the protection gaps.

CLIMATE CHANGE, DISPLACEMENT AND INTERNATIONAL LAW: COMPLEMENTARY PROTECTION STANDARDS

Organisations: United Nations High Commissioner For Refugees (UNHCR)

Author(s): Jane McAdam

Date: May 2011

Download: <http://ow.ly/lXUe1>

This paper was prepared for UNHCR's Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy.

Migration has become more restrictive in the modern era: national immigration laws restrict the entry of non-citizens into other countries. International law recognises only a small class of forced migrants as people whom other countries have an obligation to protect: 'refugees' and 'stateless persons'. Cross-border displacement as a result of natural disasters and the effects of climate change has been identified as a normative gap in the international protection regime. This paper considers the applicability of complementary protections.

In 1990, the potential impacts of climate change on human migration were identified by the Intergovernmental Panel on Climate Change (IPCC). It noted that millions of people would likely be uprooted by shoreline erosion, coastal flooding and agricultural disruption, and that climate change might necessitate consideration of 'migration and resettlement outside of national boundaries'. However, empirical research indicates that movement is more likely to be internal and/or gradual. Whilst there will be some cross-border movement, this will not be in the magnitude often predicted. Further, it is recognised that climate change being the sole reason for migration is misconceived; rather climate change will have an incremental impact adding to existing migratory pressures. This raises questions about whether it is appropriate to differentiate between displaced people who deserve 'protection' on account of climate change, and

those who are victims of ‘mere’ economic or environmental hardship. These issues are important when it comes to the development of appropriate legal and policy responses, which can respond to the reality of migration.

Existing legal frameworks seem better equipped to respond to disaster-related movement and less able to accommodate movement on account of slower-onset processes. In most cases people displaced by climate change are unlikely to gain protection under the Refugee Convention. It would be difficult to establish that the impacts of climate change could amount to a ‘well-founded fear of persecution’ as this is currently understood in law. Even if the impacts of climate change could be characterised as ‘persecution’, the Refugee Convention stipulates persecution to be on account of an individual’s race, religion, nationality, political opinion, or membership of a particular social group. Further, the impacts of climate change are largely indiscriminate rather than tied to particular characteristics such as a person’s background or beliefs. The Refugee Convention does not cover ‘individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.’

Human rights law has expanded protection obligations to include people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This is known in international law as ‘complementary protection’ because it describes human rights-based protection that is complementary to that provided by the 1951 Refugee Convention. Unlike the absolute prohibition on returning someone to inhuman or degrading treatment, for example, most other human rights provisions permit a balancing test between the interests of the individual and the State. Courts have carefully interpreted the meaning of ‘inhuman or degrading treatment’ so that it cannot be used as a remedy for general poverty, unemployment, or lack of resources or medical save in the most exceptional cases. There is currently no example of any Superior Court having determined that return to environmental disaster could evoke the principle of non-refoulement. However, if extreme weather events, increased hunger, water scarcity, rising sea level and lack of health are reframed as the right to life or inhuman or degrading treatment, the author concludes

this is a more straightforward basis for arguing a non-refoulement case. Accordingly, it seems that Articles 2 and 3 of the European Convention on Human Rights, and Articles 6 and 7 of the International Covenant on Civil and Political Rights, remain the strongest sources of protection for climate change-related claims.

So far, most responses to cross-border climate-related or environmental displacement have been domestic ones rather than international agreements. They include temporary humanitarian assistance. However it is likely that people displaced by climate change will need more permanent solutions. It is possible that temporary scheme may give way to more permanent protection but it is preferable for a more permanent immigration solution to be sought by means of advocacy. Where there are international disaster frameworks these focus on the protection of the victim rather than whether they are displaced and thus the protection gap is exposed once again. From her analysis the author pinpoints the following gaps in legal protection:

Timing

The protection possibilities discussed in this paper are an uneasy fit for slow onset climate processes. Existing international refugee and complementary protection frameworks do not adequately address the time dimension of pre-emptive and staggered movement. These are matters that any new protection or migration schema, whatever its form, would need to address.

Individual nature

The current (generally) western approach of individualised decision-making about protection on technical legal grounds does not fit with climate-induced displacement, in which the responsibility for displacement is unclear and the numbers of those displaced may require group-based rather than individual determination.

The role of climate change in the legal analysis of harm

A decision maker's task is to determine whether returning the particular individual to the conditions in the country of origin will amount to a breach of a protected right, not

the precise cause of that harm. Focusing on the latter may complicate and narrow climate change-related claims: the ability to take into account the full range of conditions both individual and in-country, irrespective of their cause, is preferable.

Conclusion

Legal and policy responses must involve a combination of strategies. Physical adaptation needs to be developed, and migration options accepted as a rational and normal adaptation strategy. Localised or regional responses may be better able to respond to the needs of the affected population in determining the framework of migration. Staggered migration, circular migration, or the promise of a place to migrate to should it become necessary might be welcome measures that could appeal both to host and affected communities alike.

International protection frameworks, underscored by refugee and human rights law, provide important benchmarks for assessing needs and responses. They provide an existing body of rules and principles to guide and inform policymaking, with identifiable rights-bearers and duty-bearers. Though ‘the scope for activating human rights law is probably limited’ in the climate change context, its normative framework can guide policy development, highlight issues that might be obscured by a purely environmental or economic analysis, and help to articulate claims about access, adaptation and balance.

The author proposes the following policy options:

The Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement may provide countries facing internal movement with a blueprint for assisting and protecting people displaced internally by climate impacts, within a rule of law and human rights-based framework.

A new treaty

Calls for a new treaty to address the movement of people displaced by climate change have a number of drawbacks including the principle of giving privilege those displaced

by climate change over other forced migrants such as those escaping poverty. Further there is little political will for developing a new treaty.

A global guiding framework on climate change related movement

A global guiding framework may usefully assist States dealing with cross-border movement. Based on existing refugee and human rights law principles, they would not only help to clarify the current scope of human rights-based non-refoulement, but would also provide guidance on its potential scope. By drawing together relevant law derived from States' existing treaty obligations, they would not require States to assume new obligations, but clarify how those obligations might apply in the climate change displacement context. They would gain authority from the fact that they would reflect, and be consistent with, binding human rights law. Over time,, such framework may facilitate the implementation of such norms into domestic law, or inform, with the benefit of State practice, new multilateral instruments.

Managed migration

Managed international migration provides a safer and more secure mechanism for enabling people to move away from the effects of climate change, without artificially treating people as in need of international 'protection' in the sense of refugee or human rights law. Managed migration is also better suited to respond to slow-onset climate change impacts, which are unlikely to trigger existing (or future) temporary protection mechanisms designed for sudden disasters. A major reason why there are pressures on asylum systems in some industrialized countries is that avenues for 'regular' economic or other independent migration are very restricted for poor people from developing countries. Overseas employment provides a way of possibly improving the economic condition and social status of the family, and in this regard may provide a short-term strategy to secure marriage or education opportunities. It is therefore a livelihood diversification and risk management tool, although it is vulnerable to shocks in the global economy. Global labour migration does not provide a solution for everyone. It is unlikely to provide a mobility pathway for the poorest people affected by climate change. the poor may benefit indirectly through remittances, which bring net wealth to the country, and as the better educated and

financed people depart cities for overseas opportunities, so the capacity of urban centres to support internal migrants may gradually increase. Climate change-related movement is likely to have a domino effect. Highly skilled, professional or business migration is likely to increase as internal rural–urban movement (or movement from outer islands in the Pacific to the main atolls) places acute pressure on the infrastructure of cities and ‘pushes’ the relatively wealthy—eligible for education and work visas—to move abroad. This is not inappropriate: to relocate a poor farmer to a capital city in an industrialized country would not serve either well, yet to enhance migration options for the educated and well-resourced may in turn open up greater opportunities for those moving within climate-affected countries. Finally, it should be noted that bilateral and regional migration agreements can be developed even if a global ‘umbrella’ protection-like agreement is also pursued.

Relocation

Within the sinking states context the concept of en masse relocation has been contemplated. Those who move to a new territory need to know that they can remain and re-enter the new country, enjoy work rights and health rights there, have access to social security if necessary, be able to maintain their culture and traditions, and also what the status of children born there would be. Thus, if en masse relocation to another country is to be considered as a permanent solution, then issues other than land alone need to be considered in order to provide security for the future.

THE NANSEN CONFERENCE, CLIMATE CHANGE AND DISPLACEMENT IN THE 21ST CENTURY, CHAIRPERSON'S SUMMARY

Publication: International Review to the Red Cross

Organisations: The Nansen Initiative

Date: September 2011

Download: <http://ow.ly/m0hOV>

The Nansen Conference on Climate Change and Displacement in the 21st Century convened by the Norwegian Government on 6 and 7 June 2011, in Oslo, gathered together academic experts, representatives of governments, international agencies and civil society, with the objective of arriving at a set of recommendations for action. Topics for discussion included the vulnerability, resilience and adaptive capacities of communities in areas that are prone to disasters and environmental changes due to climate change; the protection of displaced people; and the promotion of action to help prevent or manage displacement.

The summary of the chairperson included the following comments:

1. Climate change acts as an impact multiplier and accelerator to other drivers of human mobility. Most displacement is likely to be internal, but there will also be external displacement. The complexity of drawing a sharp distinction between 'voluntary' and 'forced' migration (displacement) spurred by environmental and development factors must be borne in mind. Motivation is a continuum, with 'voluntary' at one end of the spectrum, in a gradual transition to 'forced' at the other.
2. The displacement dimension is most evident today in the context of sudden-onset disasters. There is, however, a need to further explore the range of issues that could arise as a result of slow-onset disasters and longer-term

climate change impacts, such as planned relocation and migration management.

3. The terms 'climate refugees' and 'environmental refugee' should be avoided, as they are legally inaccurate and misleading. There is however a need to clarify the terminology for displacement related to climate change and other natural hazards.
4. The Guiding Principles on Internal Displacement and the African Union's 2009 Kampala Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) in Africa cover internal displacement resulting from natural disasters, including those linked to climate change.
5. There is a range of international and regional instruments that may provide responses to various forms of cross-border displacement related to climate change, such as the 1951 Convention relating to the Status of Refugees and the 1969 OAU Convention Governing Specific aspects of Refugee Problems in Africa. However, their coverage is limited. They could, inter alia, apply in cases where disaster-struck population groups are denied essential assistance and protection.
6. Human rights principles, including non-refoulement, may be construed to provide protection for those falling outside the international refugee protection framework. Some countries have the practice of granting temporary protection or a form of complementary protection or humanitarian status to people who have fled – or cannot return – due to a natural disaster. In some cases, State practice is guided by human rights considerations, while in others practice explicitly refers to natural disasters.
7. There is, however, a normative gap with respect to external displacement resulting from disasters, which needs to be addressed. It was suggested that States, in conjunction with UNHCR and other relevant stakeholders, could develop a guiding framework or instrument for the protection of people displaced externally due to sudden-onset natural disasters, including those related to climate change.

LEGAL AND POLICY RESPONSES TO ENVIRONMENTALLY INDUCED MIGRATION

Publication: European Parliament

Date: December 2011

Download: <http://bit.ly/wuKY6S>

This study was commissioned with the overall aim of: i) reviewing the legal aspects of environmentally induced migration in general, and environmentally induced displacement in particular; ii) deducing to what extent the current EU framework for immigration and asylum in general, and the specific instruments in regard to asylum in particular, already offers instruments adequate to respond to environmentally induced migration; iii) determining how the legal framework could evolve in order to provide an improved response to the phenomenon of environmentally induced migration; and iv) clarifying in which way such a modified legal framework can be rooted in the Lisbon Treaty and in the Charter of Fundamental Rights of the European Union.

The first part of this study considers the development of a typology of environmentally induced migration. It concludes: i) that climate change will be felt differently depending upon the vulnerabilities and capacity of communities, however, it is expected to exacerbate migration; ii) a major distinction can be drawn between rapid and slow onset climate change; iii) migration can be seen as an adaptation tool; iv) the links between drought, desertification and migration are complex.

The second part of this study reviews the global debates on policy responses to environmentally induced displacement. A number of protection gaps are identified (see below) together with acknowledgment that the challenge in addressing these gaps lies in determining whether displacement is forced or voluntary; whether it is

temporary or permanent; and how protection needs differ between internal or international displacement. The following scenarios identify the protection gaps: i) Forcibly internal displaced are protected by the Guiding Principles on Internally Displaced People (IDP) but the omission of environmental stressors as one of the protected reasons for displacement may limit effective protection and assistance. Further, poor implementation of legal standards and the weak status of the Guiding Principles as non-binding principles present inherent gaps; ii) in slow-onset climate events, it is difficult to distinguish between voluntary and forced movements, in particular due to the gradual process beginning with voluntary movements and potentially ending in forced displacement; iii) where citizens are rendered stateless by the loss of entire territories, it remains unclear whether the relevant statehood would continue to be recognised by the international community and, if not, if citizens of the affected state would be effectively rendered stateless; iv) the case of cross-border movements because affected populations are not entitled to admission and stay in another country. Further they are unlikely to be protected under the 1951 Convention on the Status of Refugees.

Generally, five main options are considered in this debate at global level: the expansion of the 1951 Geneva Convention; the extension of the Guiding Principles on Internal Displacement; the addition of a protocol to the United Nations Framework Convention on Climate Change (UNFCCC) on climate induced migration; the creation of a new tailored international convention; and, using temporary protection mechanisms to accommodate environmentally induced displacement.

Extension of the scope of the 1951 Refugee Convention. It is widely accepted that people who are forced to leave their country of origin because of climate change related events will not ordinarily fulfil the legal definition of refugee in the UN Convention on the Status of Refugees. The convention offers protection to individuals who are persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. In these cases the state is the persecutor or is unwilling, or unable, to protect the citizen. No similar clear-cut responsibility can be established in the case of environmentally or climate induced forced migration. It has been argued that the Article 1A of the Convention could be easily expanded to include environmental

degradation, the advantage of this being that many states are already party to the Convention and would thus be required to speedily implement the expanded definition. However, critics argue that any expansion or amendment of the refugee definition would lead to a devaluation of the current protection for 'convention refugees'. Further, UNHCR is concerned this could open the door to renegotiation of the Refugee Convention which could result in weakening the existing legal protection regime.

Broadening the concept of internally displaced persons. The UN Guiding Principles on Internal Displacement could apply to environmentally induced movements because the definition of internally displaced persons (IDPs) includes 'persons or groups of persons who have been forced or obliged to flee or leave their homes or habitual places of residence, in particular as a result of or in order to avoid the effects of ... natural or human-made disasters.' Although the definition of IDPs is broad, the definition is descriptive rather than legal. Economic motivations such as escaping poverty, which might apply in slow onset environmentally induced migration, are not included in the definition. Furthermore the Principles are not legally binding unless incorporated into domestic law and given legal force. It is understood very few governments have actually done this. Finally, no single governmental agency has overall responsibility for IDPs.

Creation of a new framework that applies to climate change or environmental displacement. Academics and policy makers have called for a new legal instrument. A number of comprehensive proposals have been put forward. However, general consensus is that there is insufficient international political will to bring a new convention or framework to fruition.

Adding a protocol on climate induced migration to the United Nations Framework Convention on Climate Change (UNFCCC). There are advocates who propose a protocol to cover the recognition, protection and resettlement of environmental migrants. This is further than the current negotiations would indicate. Notwithstanding this the Cancun Adaptation Framework invites all parties to take " measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national,

regional and international levels.” Whilst only a small step the Cancun Adaptation Framework is seen as the opening of potential future opportunities.

Temporary protection for environmentally displaced persons. The United States has offered temporary protection in humanitarian disasters where the country of origin cannot host the return of its nationals. This status allows for a six-month leave to remain, extendable to 18 months if conditions do not improve in the affected country. However, this protection is ad hoc and applies only to persons who are in the United States at the time of disaster. Furthermore, the disaster-struck country has to make a formal request for to the US Government. Within the European Union both Sweden and Finland also offer a protection regime akin that of the US. Denmark has, on discretionary grounds, granted humanitarian status to victims of famines and their families on an individual basis. There are clearly limitations to these temporary protection schemes.

Resettlement. Planned migration and resettlement is a strategy which could reduce population pressures in areas with a fragile environment. Potential examples are where sea-levels will lead to loss of lands. Note that the Guiding Principles on Internal Displacement stress the need for consultation and require states to ensure that ‘Internally displaced persons have the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk’. Scant legal provisions exist for internal resettlement due to environmental degradation, and when in place they mostly apply to populations affected by rapid-onset disasters. Calls have been made for a new international environmental migration fund which could provide the financial basis for policy measures to deal with displacement due to environmental factors.

Reducing the Vulnerabilities of affected populations. Mitigating the effects of climate change can be achieved through adaptation measures and development cooperation. Further, development agencies can support communities in their disaster risk management through capacity building, creating disaster management committees and establishing local early warning systems. As well as enhancing development measures with vulnerable communities in situ, initiatives should also support

migrants at their arrival destination. The study suggests that the ‘provision of technical and advisory services for local governments is an option for supporting governments in developing climate and migration sensitive development and urban planning and the establishment of service centres for migrants helps to inform migrants about their rights to avoid exploitation’.

The third section of this paper looks at the policy framework in place at the level of the European Union to identify possible policy responses under the current EU policy framework that would address environmentally induced displacement. As a general principle policy development in the field of legal migration is often a matter for individual countries. The authors of this study conclude that at European level it is unlikely a legal migration scheme which provides for those affected by climate change will be developed in the near future. Nonetheless the study goes on to consider four policy responses under current EU policy and legal frameworks.

International and Complementary Forms of Protection. At the time of the study there were no instruments specifically protecting ‘environmental displaced individuals’ at EU level. It is arguable that two Directives apply: Council Directive 2004/83/EC (29 April 2004) on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive) and Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive).

Qualification Directive. The scope of the qualification directive includes in Article 15 the notion of ‘serious harm’, which includes ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’. An individual facing serious harm cannot be returned to their country of origin. However, European legislators link this to Article 3 prohibiting torture and other ill-treatment, of the European Convention on Human Rights. Currently, the European Court of Human Rights has not interpreted environmental conditions as ill-treatment which would result in a violation of Article

3. Notwithstanding this, Article 78 of the Treaty on the Functioning of the European Union provides for member states to harmonise existing practice and adopt a new EU instrument aimed at environmentally displaced individuals, including provisions covering both displacement caused by rapid and slow onset environmental events. In theory therefore the EU could respond to environmental migration.

Temporary Directive. The Temporary Protection Directive establishes provisions for temporary protection in the event of a mass influx of displaced persons from third countries in a situation where they cannot return to their country of origin. It is envisaged that people migrating due to climate change or for environmental reasons would be included under this provision. However, there are some limitations namely that the protection is only in the event of a 'mass influx' and is only temporary in nature. To date the Directive has not been used despite calls from member states to apply it following the conflict in Libya and uprising in Tunisia.

National responses. Only a very small number of EU Member States, however, have introduced express provisions specifically addressing protection needs of environmental displaced individuals.

Resettlement. Although in theory it could be possible to resettle people migrating for climate reasons, the availability of resettlement opportunities within the European Union are far lower than in other industrialized States, notably Australia, Canada and the US. From a practical perspective it appears that there is no means of exchanging information between EU Member states nor standard coordination at EU level on resettlement issues. The resettlement activities therefore occur on a bilateral basis between resettlement countries and UNHCR. However, with the negotiation of the creation of a joint EU resettlement programme there are hopes that this situation could improve.

EU Global Approach on Migration. The Global Approach to Migration can be described as the external dimension of the EU's migration policy. Adopted in 2005, it covers three thematic areas: legal migration; irregular migration; and, migration and development. In the background paper to the Global Approach, the European Commission noted that

there is an urgent need for an agreed terminology and definition at international level and to clarify the legal status of people migrating due to climate change to ensure adequate legal protection.

Discussions on adequate legal frameworks for protecting environmental displaced persons and migrants moving to the EU. During the consultations there was general agreement that the refugee terminology and 1951 Refugee Convention should not be extended to accommodate 'climate refugees' because practitioners and policy-makers fear that new negotiations would lead to a more restrictive convention. Although most of the participants would welcome the adoption of an international framework to close the 'protection gap' for environmental migrants, it was recognised there was a lack of political will. It was underlined that any responses to environmental displacement must be based on human rights. Further, the Guiding Principles for Internally Displaced Persons are seen as a significant baseline even though containing political, normative and institutional gaps.

This study briefing paper goes on to consider possible EU actions to increase third countries' resilience capacities and strengthening protection mechanisms in third countries.

Neither the Charter on the Fundamental Rights of the European Union nor the European Convention on Human Rights contain the right to a healthy environment. However, with the Charter becoming a legally binding document, it is arguable that EU policies will have a stronger fundamental rights framework. One possible response where people cannot be returned to a country affected by an environmental disaster would be to develop a political or legal mechanism at the EU level that would provide a basis for temporarily prolonging the validity of visa or residence of third country nationals. Article 79 Treaty on the Functioning of the European Union gives sufficient grounds to the Council, in common with the European Parliament, to take legislative measures in order to develop a common immigration policy, including the case of impossibility of return (while leaving at the discretion of the member state the duration and the method of granting the prolongation of the stay). Reference may also be made to the Return Directive. The Directive provides a non-exhaustive list of

obstacles to removal and thus leaves considerable room for discretion and allows member states to decide on other cases when a third country national cannot be removed.

A future review of the return directive could consider establishing a mechanism to define additional cases in which removal should be suspended complementing the grounds listed under article 9(1) of the Directive. This could involve specifying generic categories (such as citizens of countries affected by a natural disaster), but also could be implemented by providing a general mechanism to define relevant categories by Decision of the Council. Neither a possible framework for prolonging the validity of stay of residence titles or entry visas, nor measures under the Return Directive, provide a mechanism to admit individuals displaced by natural disasters.

PROTECTING PEOPLE CROSSING BORDERS IN THE CONTEXT OF CLIMATE CHANGE. NORMATIVE GAPS AND POSSIBLE APPROACHES

Organisations: UN High Commission for Refugees

Authors: Walter Kalin and Nina Schrepfer

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There is agreement that climate change has an impact on the movement of persons and numbers of displaced persons and that numbers of migrants are expected to increase as a result of the changing climate. There is little agreement, however, on how best to address climate related displacement and (voluntary) migration and the protection of affected persons. Further, there undoubtedly is a normative gap with respect to cross-border migration and displacement. This paper reviews the gaps in legal protection as well as current approaches on cross-border movements induced by the impact of climate change. It reviews possible strategies to create an effective protection regime for these people, taking account of the possible increase in the numbers of affected persons in the future.

Linking climate change and migration is not an exact science. The authors conclude that: i) climate change itself does not trigger the movement of persons, but some of its effects such as environmental degradation, sea-level rise or conflict over resources have the potential to do so; ii) it is often impossible to establish a direct link between climate change and a particular climate-related event triggering the movement of persons; iii) even where, for example there are rising sea levels and a direct link between climate change and a specific natural event is likely, population movements are multi-causal. The potential to trigger population movements will be dependent upon a number of factors; i) the intensity and/or frequency of the climatic event/s; ii) the vulnerability of the local population; iii) the capacity of the those affected to cope with the hazard.

The authors conceive of five scenarios in climate related migration:

- *Sudden onset disasters*. For example, floods, hurricanes, etc;
- *Slow onset degradation*: For example loss of agricultural land, desertification, drought, thawing of perma-frost;
- *Low lying island states*. Where rising sea levels may render small islands uninhabitable;
- *Areas prohibited from human habitation*. The state seeks to protect potentially affected populations, or to mitigate climate change and to adapt to it.
- *Unrest, violence or armed conflict*.

The protection agenda and with it the issue of displacement triggered by the effects of climate change, has largely been neglected from international discussions thus far. Perhaps heeding international pressure the the Cancún outcome agreement on long-term cooperative action under the United Nations Framework Convention on Climate Change now invites states to include '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels; (...)'. The significance of this inclusion is that migration as a consequence of climate change is recognised as an adaption challenge and should become part of national adaptation plans.

The pattern and scope of forced or voluntary migration is complex and can be viewed as a continuum with forced migration at one end and voluntary at the other. More clear cut is the distinction between internal and cross-border migration. The majority of those displaced by the effects of climate change are internally displaced persons (IDP's). According to the 1998 United Nations Guiding Principles on Internal Displacement, IDPs are defined as 'persons who have been forced or obliged to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of (...) natural or human-made disasters and who have not crossed an internationally recognised state border'. The Guidelines although not legally binding, are universally recognised, even if not strictly adhered to. As permanent citizens of a

particular country IDPs are also protected by applicable domestic and international human rights provisions.

Those who decide to leave their homes for reasons relating to climate change but who are not forced to, as life would still be possible there, are internal migrants. No specific legal protection applies to them beyond relevant human rights provisions.

For migrants who cross borders the available legal protections regimes comprise: i) international human rights standards; ii) the Convention on the Status of Refugees; iii) the Convention on the Status of Stateless persons; iv) international humanitarian law. Notwithstanding this, the authors identify significant legal gaps in the protection regime, namely:

Terminology

There is no consensus on terminology for the phenomenon of migration for reasons of climate change. The term ‘environmental’ or ‘climate refugee’ has been used but this is misleading and widely discredited.

Non-applicability of International refugee law save in very specific cases

International refugee law was not conceived to protect persons displaced across borders by the effects of climate change. Article 1A of the Convention on the Status of Refugees contains three key elements, namely (i) presence outside the country of origin, (ii) because of persecution on account of specific reasons (race, religion, nationality, membership of a particular social group or political opinion), and (iii) inability or unwillingness to avail oneself of the protection of one’s country. In most cases migration due to climatic events does not fulfill the criterion of persecution on account of any of the aforementioned grounds. Nevertheless, similar to persecution, climate change-related disasters and an ensuing lack of food, water or health services could clearly give rise to a serious threats to life. Those displaced by the effects of climate change may face similar dangers as refugees, although with differing causality. There remains nonetheless a significant difference, from a legal perspective,

between the two groups of people. Whilst international refugee law looks to substitute the country of origin which will no longer protect, with the country of asylum, in the case of cross-border displacement caused by effects of climate change, the country of origin normally does not turn against affected people but remains willing to assist and protect them. The exception to this is where a state fails to offer assistance and protection to certain people because of their race, religion, nationality, membership of a particular social group or political opinion and as a consequence exposes them to treatment amounting to persecution.

Situations of violence, serious human rights violations or armed conflict triggered by disputes over shrinking natural resources (scenario 5) only become relevant if persecutory measures are based on the race, religion, nationality, membership of a particular social group or political opinion of affected persons. Even where the underlying causes of the conflict are due to the impact of climate change, refugee status has to be granted regardless of the root causes of a given armed conflict or violence. However, the Refugee Convention does not protect people fleeing the general dangers of violent conflict who are not targeted for any of the relevant five aforementioned grounds.

Human rights regime

Those who leave voluntarily are best classified as migrants. They are entitled to general human rights protection, but importantly human rights law does not entitle them to enter or remain in a foreign territory. If working individuals could be defined as migrant workers they could benefit from the The International Convention on Protection of the Rights of All Migrant Workers and Members of their Families. The Convention does not cover the needs of those who use migration as part of their individual or family adaptation strategy. Neither does it give any right to be admitted or to remain in another country and thus provides very limited protection. Further very few countries have ratified the Convention.

Human rights law provides that an individual cannot be refouled (returned) where the removal of a person back to the country of origin would amount to inhuman

treatment. The doctrinal basis of this jurisprudence is that it is the behaviour of the returning state in preventing an act contrary to human rights law that is being judged, rather than the actions of the country of origin. In the case of *D. v. UK* the European Court of Human Rights recognised that Article 3 ECHR may also apply in exceptional cases. In this instance a terminally ill man was not deported to his country of origin because 'conditions of adversity' reducing the 'already limited life expectancy' of the person concerned, 'subject[ing] him to acute mental and physical suffering' were such as to make deportation inhuman. Arguably, this situation could be compared to environmental disasters where sending people back to a country in which they could not access humanitarian assistance or their life would be threatened would breach human rights provisions. Human rights bodies have not yet had an opportunity to decide such a case and it remains to be seen whether they would be ready to expand existing law.

Low-lying states

Whilst rising sea levels cause a slow-onset environmental disaster, people migrating from low lying states have the same rights as have already been explored above. However, if a state ceases to exist the legal situation is somewhat different and the question arises as to whether the Convention on the Status of Stateless Persons becomes applicable. However, the definition of a stateless person is someone without a nationality, not a territory. Further the Convention is silent on any requirement to be admitted to another country. In the case of small island states, it is probable that their governments would try to retain at least a symbolic presence on their former lands or others might seek to obtain territory from another state. So these people could be without legal territory but not legally stateless. The key issue, therefore, is how to guarantee admission of citizens of submerged island states onto other countries on a permanent basis and how their rights can be secured. The responsibility of the international community would surely be invoked and a new law required.

Based on the above analysis the authors consider the five scenarios explored above and review the normative gaps therein:

Rapid onset Disasters

Most commonly migration from disasters is internal and the Guidelines on Internal Displacement apply. Those that cross borders only qualify as refugees if their country of origin fails to give them adequate humanitarian assistance for reasons of discrimination. If they cross a border and are migrant workers, they may qualify under the migrant workers convention but only if the receiving state is a party. Otherwise, they have no right of entry or right to remain, unless they can demonstrate that to be returned would amount to inhuman treatment due to serious risk of life and health.

Slow onset degradation

Save for the exceptions set out in the section above, there are no legal protections if people cross borders as above.

Low Lying Small Island states

Where small island states become uninhabitable due to a rise in sea level, there are no legal protections enabling persons to be relocated in another country. It is unclear whether the law relating to stateless persons is applicable.

Areas prohibited from human habitation

Where a zone is declared as uninhabitable, the state will be obligated to relocate its citizens internally. If this process is excessively protracted and/or discriminatory, and people are forced to cross a border, there could be an argument that they fall under the refugee convention.

Unrest, violence or armed conflict

Where people flee due to unrest and armed conflict there *may* be an obligation under refugee law, but not without satisfying the strict provisions found in Article 1A. Alternatively protection may be given through regional agreements in Africa and Latin

America which define a refugee more broadly to include those caught up in armed conflict.

One consequence of the gap in legal protection means that when people cross borders due to climatic events, they are in a state of limbo. No single agency has responsibility for them or oversight as to their protection needs. Unlike refugees, the country of origin largely remains responsible for these migrant people and should advocate for their safeguards. Regional bodies should also play a role in monitoring and addressing the difficulties facing these migrants.

The report goes on to look at how some institutions have made some in-roads to close the gaps.

Domestically

Many countries have included provisions regarding assistance and protection for persons affected by natural disasters in their country, including internally displaced persons, in their disaster management legislation. Further, there is some anecdotal evidence that some states have admitted and received displaced persons on their territory as under temporary protection schemes, on a very ad hoc basis, such as in the context of a flooding. These models have in common that their granting of temporary or subsidiary protection is not based on any legal entitlement of persons concerned but rather depends on the discretion of the authorities. Thus, they do not provide a predictable protection tool to cover cases of cross-border displacement.

Regional level

In Europe, the Parliamentary Assembly of the Council of Europe adopted Resolution 1862(2009) on environmental migration and displacement, which invited the Committee of Ministers to 'set up a working group, in co-operation with other European institutions, to carry out a comprehensive legal study on the gaps in existing international law and normative regulations with a view to an eventual elaboration of a European framework convention for the recognition of the status of environmental migrants, should this be deemed necessary' (para. 6.2) and to 'consider adding a new

protocol to the European Convention on Human Rights (...), concerning the right to a healthy and safe environment' (para. 6.3).

At the level of the European Union there are no specific directives on climate and migration, although the provisions on temporary protection may apply but only if there is a 'mass influx' of migrants.

Africa has become more active in addressing the many effects and impacts of climate change at the regional and sub-regional levels in various forums and through a number of bodies. Adaptation is key for the African continent and is a priority within the African Union and by sub-regional African organisations such as the Southern African Development Community (SADC), but not specifically with regard to cross-border displacement and migration.

In Asia and the Americas, whilst climate change is an issue of concern, nothing yet has been discussed or adopted specifically on climate and migration.

International level

Internationally, the most important step thus far was made in Cancún in December 2010, with Article 14 of the Cancún Outcome Agreement on Long-term Cooperative Action under the UN Framework Convention on Climate Change inviting states to enhance action on adaptation by undertaking 'Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels'.

In 2009, the UN General Assembly requested the UN Secretary-General to submit a comprehensive report to the Assembly on the possible security implications of climate change. Significantly, the report highlights the relevance of population movements.

The Human Rights Council commissioned a report from the High Commissioner on the relationship between human rights and climate change. The report alludes to internal

and cross-border migration and displacement as a consequence of climate change impacts and highlights the applicability of human rights law to all affected people, but notes the insufficiency of this body of law regarding the right to admission to other countries.

The Nansen Conference on Climate Change and Displacement, hosted by the Norwegian Government in Oslo on 6-7 June 2011, generated an important outcome document consisting of the Chairperson's summary and a set of ten Nansen Principles that were recommended as guidance to address some of the most urgent challenges of climate-related displacement.

To conclude, the report proposes a four prong strategy:

- Preventing displacement through disaster risk and vulnerability reduction and other adaptation measures;
- Managing migration as adaptation measures;
- Providing temporary protection status for persons displaced to other countries and permanent admission in cases where return turns out to be impermissible, impossible or cannot be reasonably be expected over time; and
- Organizing resettlement/relocation for populations of low-lying small island states and other states losing substantial amounts of their territory.