Climate change, displacement and international protection

Matthew Scott
Doctoral Candidate in Public International Law
matthew.scott@jur.lu.se
@matthewscott111
Key questions for the lecture / outline

1. Is there such a person as a climate refugee?
2. What is a natural disaster?
3. Does the Refugee Convention extend protection to people displaced across international borders in the context of disasters and climate change?
4. To what extent do complementary forms of protection assist?
1. Climate refugees?
The role of climate change in ‘natural’ disasters

• Links between climate change and natural disasters are difficult to establish
• IPCC attributes degrees of certainty to the role of climate change in particular types of disasters. For example, at the global level:
  – ‘medium confidence’ that anthropogenic influences have contributed to intensification of extreme precipitation
  – ‘medium confidence’ relating to changes in drought patterns.
  – ‘likely’ anthropogenic influence on the observed increase in extreme coastal high water worldwide related to increases in mean sea level in the late 20th century
  – ‘low confidence’ in the attribution of any detectable changes in tropical cyclone activity to anthropogenic influences (due to uncertainties in historical tropical cyclones record, incomplete understanding of physical mechanisms, and degree of tropical cyclone variability)

Intergovernmental Panel on Climate Change. 2012. Managing the risks of extreme events and disasters to advance climate change adaptation. Available at: http://ipcc.ch/publications_and_data/publications_and_data_reports.shtml#SREX p. 119
Attribution in specific events

• Typhoons – theoretically significant, but lack of empirical evidence – World Meteorological Organization report – but note Myles Allen’s recent call for more attribution studies

  Trends in intense typhoon frequencies, such as Category 4 to 5, are particularly divergent in recent decades, and remain uncertain. Satellite-based intensity trends since 1981 show only modest evidence for significant trends and their utility is limited by the relatively short record length together with uncertainty about natural variability levels... key uncertainties remain about both data homogeneity and the potential role of natural variability

  http://www.typhooncommittee.org/45th/Docs/item%2011/2assessment_FINAL.pdf

• 2011 East Africa Drought – more evidence - UK Met Office ‘attribution’ study

  We found that the particularly dry short rains in 2010 were most likely caused by natural variability. However, the chances of long rains as dry, or drier, as those of 2011 were found to have increased due to human influence

Displacement in the context of natural disasters

- On average 28.5 million people newly displaced each year as a result of sudden onset ‘natural’ disasters (IDMC 2015)
- Slow-onset versus sudden-onset
- Internal displacement
  - Those who remain
  - Those who move short distances
  - Those who move longer distances, especially to/from rural areas to cities
- International displacement
  - Cross border
  - Longer distances
- Movement can be temporary or permanent
- Difficult to draw direct causal link between some natural disasters and displacement, especially slower-onset disasters
- Most ‘environmental migration’ is expected to be internal
What measures are in place for internally displaced people?

Guiding Principles on Internal Displacement Principle 15(d)
- [t]he 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

The Kampala Convention Article 9(2)(e)
- States Parties shall… [r]espect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk
What measures are in place for those who cross international borders?

A thin patchwork characterized mostly by its holes

- Refugee Convention – the issue of persecution and the causal nexus – but 'pathways to protection' exist
- EU Temporary Protection Directive – the need for 'mass influx' and a Council resolution
- Qualification Directive – Article 15 (subsidiary protection) and 21 (non-refoulement)
- Ad hoc decisions by individual States
  - Brazil and Haitians
- USA Temporary Protection Visas (Immigration and Nationality Act (USA) 8 USC § 244)
- Sweden and Finland immigration law – sudden onset environmental catastrophe (see 4 kap. 2a(2) § UtL & Regeringens proposition 1996/97:25)
- New Zealand migration programme – MFAT 'not about climate change at all'
What responses have been proposed?

- A new Convention for protecting climate change migrants
- An amendment or additional protocol to the Geneva Convention relating to the Status of Refugees (the Refugee Convention)
- An additional protocol to the European Convention on Human Rights
- An additional protocol to the UN Framework Convention on Climate Change
- Ad-hoc solutions by individual States in response to specific events (which will hopefully develop into a *jus cogens* standard)
- Managed migration
- Strengthening local adaptive capacity
- Gradual consensus-building around protection policy for victims of natural disasters – The Nansen Initiative
- Pinheiro Principles

*Within the European Union*

- Use of the Temporary Protection Directive in cases of mass influx
- An amendment to Article 15(c) of the Qualification Directive to include environmental disaster as a basis for the grant of subsidiary protection
- Further development of the Joint EU Resettlement Programme
General perspectives on climate refugees

• No agent of persecution
• Impacts are not yet serious enough to attain the severity threshold
• Climate change does not discriminate
• States generally do their best to help
• Climate change impacts rarely affect an entire country

• See for example
  – Jane McAdam – *Climate Change, Forced Migration and International Law*, 2012
  – UNHCR Bellagio consultation
  – Kälin and Schrepfer
The New Zealand jurisprudence

• AF (Kiribati)
• AC (Tuvalu)

• Rising sea levels, extreme weather, adverse conditions of existence

• Not entitled to refugee status
  – No persecution
  – No Convention reason
  – No risk of exposure to serious harm

• Not entitled to complementary protection
  – Any deprivation of the right to life would not be ‘arbitrary’
  – Any serious harm would not constitute ‘treatment’
  – No real risk
Would cases be decided differently in CoE Member States?

- Article 3 ECHR
  - 3 types of ‘foreign’ Article 3 cases
    - Type 1 – *Soering v United Kingdom*
    - Type 2 – *N v United Kingdom*
    - Type 3 – *Sufi & Elmi v United Kingdom*
  - Is the risk of exposure to climate change-related harm closer to Type 2 or Type 3?

- Article 8 ECHR
  - Fairness of expulsion in light of host state contribution to climate change related harm
Shift the focus from the atmosphere to the ground
2. What is a natural disaster?
Definitions of disaster

- **UNISDR** - A serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources. [http://www.unisdr.org/we/inform/terminology#letter-d](http://www.unisdr.org/we/inform/terminology#letter-d)

- **IPCC** - Severe alterations in the normal functioning of a community or a society due to hazardous physical events interacting with vulnerable social conditions, leading to widespread adverse human, material, economic, or environmental effects that require immediate emergency response to satisfy critical human needs and that may require external support for recovery. IPCC, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (CUP 2012) 5
Vulnerability and exposure

- People are differentially affected in disasters owing to their class, race, gender, age and other characteristics.
- New Orleans in the aftermath of Hurricane Katrina – overwhelmingly black and elderly people were victims – a combination of vulnerability and exposure

Multiple factors involved in ‘disaster-related harm’

- Natural Variability
- Climate Change
- Exposure
- Population Pressures
- Governance
- Individual Vulnerability
- Infrastructure
Disasters can both reflect and result in sustained and systemic violations of human rights

- The right to life (Art 6 ICCPR)
- The right to an adequate standard of living (Art 11 ICESCR)
- The right to food (also Art 11 ICESCR)

People living in marginalised situations face challenges relating to shelter, access to food, and access to adequate medical care. Disasters can make matters much worse.
Forms of disaster related harm
Death

Loss of crops and livestock and impacts on livelihoods and food security


Malnutrition, Starvation and Dehydration

A doctor examines Mihag Gedi Farah, a seven-month-old child who weighs just 3.4kg, in a field hospital of the International Rescue Committee in Dadaab. Picture: AP/Schalk van Zuydam
Reduced access to fresh water

Increased disease incidence

Stagnant pools of water are common in many IDP camps in Mindanao, providing fertile breeding for a host of water-borne diseases. Credit: IRIN/David Swanson
Limited or lack of access to essential services (i.e. medical facilities)

Home health care worker Terri Johnson screams, "my patient needs oxygen" as she pleads for help for Dorothy Duvic outside the Morial Convention Center in New Orleans in the aftermath of Hurricane Katrina Thursday, Sept. 1, 2005. After being stranded for days at the convention center, she tried to seek help at the Superdome but was turned away at a road block and forced to return. (Melissa Phillip : Chronicle)

Destruction of infrastructure – transport, communications, health

Homelessness

A family amid the ruins of their house, destroyed by Cyclone Nargis, near Kyauktan, in the delta region south of Rangoon. Photo: AFP/Getty Images

Source: Emma Larkin, ‘Book extract: the hidden horrors of Cyclone Nargis: How the death and destruction wrought by Cyclone Nargis in Burma was largely hidden from world view’, the Telegraph (UK) 10 July 2010.
Armed Conflict

A young man from the Nyangatom tribe patrols a water access point on the border between Ethiopia and Kenya. The site is one of ongoing conflict between the Nyangatom, the Kenyan border police, and the Turkana tribe. – Source Evan Abramson, When the Water Ends, http://vq.vassar.edu/issues/2011/02/features/when-the-water-ends.html
Public security threats

A man fires warning shots into the air to prevent looters from ransacking his shop

Photo: REUTERS; Source: Daily Telegraph, Haiti earthquake: looting and gun-fights break out
Gender-based violence

A tent city in Port-au-Prince in July. After the 2010 earthquake, residents of the capital’s tent cities were 20 times more likely to report a sexual assault than other Haitians. Source: New York Times, Haiti’s Silenced Victims, http://www.nytimes.com/2012/12/09/opinion/sunday/haitis-silenced-victims.html?pagewanted=all&_r=0
Abuse, neglect and exploitation of children

Jennette is only one of the many children facing the consequences of neglect due to the distrust surrounding Ebola survivors. Source: The Trauma and Mental Health Report, York University, Toronto; http://trauma.blog.yorku.ca/2014/10/fear-of-ebola-leaves-orphaned-children-abandoned/
Other impacts

• Disruptions to education
• Loss or destruction of documentation
• Family separation
• Unequal access to assistance
• Displacement, forced relocation, forced return
• Loss of property or conflict over property rights
3. Does the Refugee Convention extend protection to people displaced across international borders in the context of disasters?
Persecution for a Convention reason?

• Actor of persecution?
  – The state – acts and omissions – see following slides
  – Non-state actors plus lack of state protection?

• Threshold

• Convention reason

• A protection gap?
The application of the 1951 Convention in disasters

For reasons of race, religion, nationality, MPSG, political opinion, the state:
- Causes environmental damage or allows it to be caused
- Takes resources, in particular food
- Denies access to disaster relief
- Implements discriminatory agricultural policies against people already affected by climate change
- Obstructs international humanitarian assistance (i.e. Nargis)
- Uses the disaster as a pretext for persecution (i.e. Nargis)
- Forcibly relocates or prohibits people to live in particular areas, or fails to provide support in areas of relocation
- Fails to implement effective and non-discriminatory disaster risk reduction measures

Also:
- Where people flee in the context of disaster but the well-founded fear of being persecuted exists independently
- Conflict or violence in disasters or situations of depleted resources connected to climate change
- Where, owing to her predicament as a person with protected characteristics, she has a well-founded fear of facing a serious denial of her human rights in the context of a disaster
3. To what extent do complementary forms of protection assist?
Complementary protection under ICCPR and ECHR

**ICCPR**

"the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a **real risk of irreparable harm**, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”

(HRC GenCom 31)

**ECHR**

It would hardly be compatible with the underlying values of the Convention… were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be **in danger** of being subjected to torture… this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a **real risk** of exposure to **inhuman or degrading treatment** or punishment proscribed by that Article (article 3) *Soering v the United Kingdom*
Arbitrary deprivation of life and inhuman or degrading treatment

Arbitrary deprivation of life
• Conventionally entails conduct that is
  – not prescribed by law;
  – not proportionate to the ends sought; and
  – not necessary in the particular circumstances of the case
• Wider application with recognition of positive obligations to protect life – can include failures of disaster risk reduction – but with recognition of margin of appreciation
  - NZIPT cases
    - Budayeva v Russian Federation
    - Öneriylıdiz v Turkey

Inhuman or degrading treatment
• Need not be intentionally inflicted
• Can be caused by acts as well as omissions
• Can be perpetrated by non-state actors
Judicially recognised relevant conduct

- Deliberate infliction of socio-economic harm by state agents or a failure to intervene while non-state agents did the same

- Adoption of a particular legislative, regulatory or policy regime in relation of a section of the population to whom the individual belongs (such as asylum seekers – consider *M.S.S v Belgium and Greece* (Art 3 ECHR; *Limbuela v Secretary of State for the Home Department* Art 3 ECHR)

- Failure to discharge positive obligations towards persons wholly dependent on the state for their socio-economic well-being (such as detainees)
Judicial application in disasters and climate change cases

ICCPR

AF (Kiribati) & AC (Tuvalu)
- No evidence of present risk of *arbitrary* deprivation of life (Art 6) or inhuman or degrading *treatment* (Art 7) in light of harm prevalence and state DRR
- Express recognition of relevance of state conduct in DRR and response as relevant to assessment
- Fear of being exposed to disaster related harm in the future mere conjecture or surmise – but guidance on anticipatory risk assessment

ECHR

*Sufi & Elmi v the United Kingdom*
- Where the ‘parties to the conflict’ are the predominate cause of a humanitarian crisis, the exceptionality requirement in *N* is dispensed with and focus placed on
  - The ability to cater for basic needs
  - Security situation
  - Expected duration of the crisis
- ‘Treatment’ not expressly discussed
- Risk assessment not conducted
Potential applications recognized in the New Zealand case law – ex post facto

• Due to political weighting, state response to natural disasters fails to meet the recovery needs of marginalised groups
• The provision of post-disaster humanitarian relief may become politicised
• The increased vulnerability of persons displaced in the wake of natural disasters increases the risk of them being subjected to cruel treatment (for example, being trafficked) by non-state actors against whom the state is unwilling or unable to provide effective protection.
• Arbitrary withholding of consent for necessary foreign humanitarian assistance.

[thus quite similar to the recognised potential refugee-producing scenarios]

AC (Tuvalu)
Potentially relevant ex-ante conduct

- Failure to enforce building standards?
- Failure to maintain storm defenses?
- Failure to maintain early warning systems?
- Failure to evacuate?
- Failure to warn of risks?
Risk assessment

Ongoing risk assessment

- **Sufi & Elmi**
  - Ability to cater for basic needs (consider preponderance of humanitarian intervention – what about smaller scale disasters?)
  - Security situation (a necessary condition?)
  - Prospect of situation resolving (sudden onset risk of harm reduces substantially within days, weeks and months; possibly longer risk in slower onset complex emergencies)

Anticipatory risk assessment

- **AF (Kiribati) & AC (Tuvalu)**
  - Past failures of DRR & response
  - Prevalence of disaster related harm

- Other considerations
  - Likelihood of occurrence of the disaster itself (but consider *Ng v Canada* and *Soering v UK* - substantial judicial skirting of uncertainty)
  - Individual risk profile; disaggregated disaster stats – what makes one person face a ‘real risk’ in the context of a disaster?
But assessing risk on return is not actuarial science! Consider all factors – differential vulnerability and exposure; past exposure and failure of state protection.
Conclusions

• Refugee Convention addresses protection needs in limited situations, but should always be considered

• Complementary protection addresses protection needs in some situations of cross-border disaster related displacement, but challenges relating to
  – Causation (role of human conduct in disaster; margin of appreciation)
  – Risk on return (ongoing and anticipatory; individual risk profile)

• Better country information relating to disaster risks; more jurisprudence will help clarify extent of refugee and complementary protection

• The vast majority of the 28+ million people annually affected by disasters will not be entitled to / may not be in need of international protection

• A clear role for temporary protection regimes; categorical protection; bilateral and regional arrangements; discretionary policies